1123

No. 3072

United States

Circuit Court of Appeals

For the Ninth Circuit.

1123

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of the defendant, and for cause of action alleges:

I.

That the plaintiff, United States of America, is a corporation sovereign.

II.

That the defendant, Illinois Surety Company, is a foreign corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and duly and regularly authorized, pursuant to the laws of the State of California, to transact business within the said State of California.

III.

That on the 4th day of November, 1911, one Pierre Grazi, the proprietor of a theatrical exhibition and a person emigrating to the United States from a foreign country, to wit, France, imported and brought with him into the port and collection district of New York, State of New York, certain implements of his trade or profession, to wit, theatrical effects contained in three chests, 63 trunks, 76

cases, 13 baskets, 9 boxes, 6 bundles, 3 valises and 10 hampers. [1*]

IV.

That thereafter, the said theatrical goods and effects so imported as aforesaid, were, on the said 4th day of November, 1911, brought by the said Pierre Grazi under an immediate transportation order, from the said port of New York in the State of New York, to the port of San Francisco, in the State and Northern District of California, and thereafter, and thereupon, and on the 11th day of November, 1911, the said goods and effects were, by said Pierre Grazi, entered at the port and collection district of San Francisco in the State and Northern District of California, under consumption entry No. 15,888.

V.

That the said goods and effects so imported as aforesaid, were duly appraised according to law, and the value fixed at $15,558. That the amount of duty thereon calculated according to law was $9,726.

VI.

That the said Pierre Grazi, desiring to take the benefit of section 656 of an Act of the United States entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States and for other purposes," approved August 5th, 1909, did, on said 11th day of November, 1911, make, execute and deliver to the United States of America, with the defendant as surety thereon, that

*Page-number appearing at foot of page of original certified Transcript of Record.

certain bond for redelivery, in the words and figures following, to wit: [2]

3000.00

6000.00 158

BOND FOR REDELIVERY.

This bond to be used for all purposes of importation of articles that are to be exported within six months, under Sections 2505, 2511, 2512 and 3021, Revised Statutes.

KNOW ALL MEN BY THESE PRESENTS: That we, Pierre Grazi as principals, and ——— as sureties, are bound unto the United States of America in the sum of Six Thousand Dollars, to be paid to the United States; for the payment whereof we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 11th day of November, nineteen hundred and eleven.

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall within six months, to be computed from the date of the importation of the Theatrical Effects hereinafter mentioned, imported by Pierre Grazi in the So. Pc. Company, from New York consisting of

Pierre Grazi	3 chests	
	63 trunks	
	76 cases.	
	13 baskets	Personal effects,
	9 boxes	Manf. Coton,
	6 bundles	Silk, &c.
	3 valises	
	10 hampers.	

Entry 15888

for redelivery, under the provisions of section ——, Revised Statutes of the United States, redeliver the same to the Collector of San Francisco, the port of its importation, after its use for export, and furnish such proof of its identity as the Secretary of the Treasury by regulation may require; and shall enter the said effects for exportation from the United States within said six months, in the manner prescribed by law and the [3] Regulations of the Treasury Department, then this obligation will be void; otherwise, to remain in full force and virtue.

(Signed) PIERRE GRAZI. (Seal)

ILLINOIS SURETY COMPANY. (Seal)

[Corporate Seal]

By CHARLES T. HUGHES, (Seal)

Its Attorney in Fact.

Sealed and delivered in presence of

(Signed) THOS. W. SCOTT.

Penalty of this bond will be double the appraised value of the merchandise.

Here insert description of articles, and statements of value, as contained in the entry.

[Endorsed as follows]:

"Surety consents to 6 months extension.

ILLINOIS SURETY COMPANY.

By CHARLES T. HUGHES,

Its Attorney in Fact." [4]

VII.

That on the faith of said bond so executed and delivered as aforesaid, the said Pierre Grazi was allowed to receive, and he did on or about the 11th day of November, 1911, receive the said goods and theatrical effects above referred to, and the whole thereof.

VIII.

That on or about the first day of May, 1912, and during the time allowed by law in such case, the said Pierre Grazi delivered, and caused to be delivered, for exportation pursuant to said bond for redelivery as aforesaid, a portion of said goods and effects, the duty upon which, calculated upon said appraised value, was $3,617.34 and no more.

IX.

That more than three years have elapsed since the execution of said bond, and the said goods and theatrical effects have not, nor have any of them, except as hereinabove stated, been exported or delivered to the Collector of Customs for the port and collection district of San Francisco or elsewhere, for the purpose of exportation. That the time allowed by law for said delivery for exportation has long since elapsed.

X.

That the sum of $6,108.66, the duty on that por-

tion of said goods not exported or delivered for exportations above set forth, has not been paid, nor any part thereof.

XI.

That on the 9th day of January, 1915, and at divers other times both before and after said date, the plaintiff demanded of the defendant the full penalty of said bond in satisfaction of its demand as hereinabove set forth, but the defendant then and there [5] refused, and ever since has refused, and now refuses to pay the said penalty of said bond, or any part thereof.

WHEREFORE, plaintiff demands judgment against the defendant for the penalty of said bond, to wit, the sum of $6,108.66 (six thousand one hundred and eight dollars and sixty-six cents), together with lawful interest thereon from and after January 9th, 1915, together with costs of suit.

JNO. W. PRESTON,
United States Attorney,
Attorney for Plaintiff.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

John W. Preston, being first duly sworn, deposes and says: That he is the United States Attorney for the Northern District of California; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters, he believes it to be true.

JOHN W. PRESTON.

Subscribed and sworn to before me this 19th day of April, 1915.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Apr. 19, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the District Court of the United States, in and for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,
Defendant.

Amended Demurrer to Complaint.

Now comes the defendant, and demurring to the complaint on file in this action for grounds of demurrer, alleges as follows:

I.

That the said complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That the said complaint is uncertain in this, that it cannot be ascertained therefrom what the value of the goods imported from France by Pierre Grazi, mentioned in the said complaint, was, in that the

bond set forth in the said complaint is for Six Thousand ($6,000.00) Dollars, and purports to be for double the appraised value of the merchandise therein mentioned, while in Paragraph V of the said complaint, it is alleged that said goods were appraised and the value fixed at Fifteen Thousand Five Hundred Fifty-eight ($15,558.00) Dollars, and that the amount of duty thereon calculated according to law was *$97.26.*

III.

That the said complaint is ambiguous for the same reason that it is uncertain.

IV.

That the said complaint is unintelligible for the same [7] reasons that it is uncertain and ambiguous.

WHEREFORE defendant, having fully answered, prays to be dismissed with its costs.

T. C. WEST,
CHAS. H. FAIRALL,
Attorneys for Defendant.

I hereby certify that the above demurrer, in my opinion, is well taken and the same is not interposed for purposes of delay.

T. C. WEST,
Atty. for Deft.

Service of a copy hereof admitted June 14, 1915.

JNO. W. PRESTON,
Atty. for Plff.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

At a stated term, to wit, the July term, A. D. 1915, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,878.

UNITED STATES OF AMERICA

vs.

ILLINOIS SURETY CO.

Minutes of Court—September 20, 1915—Order Overruling Demurrer, etc.

Defendants amended demurrer to the complaint came on to be heard and after arguments being submitted and fully considered, it was ordered that said amended demurrer be and the same is hereby overruled with leave to answer in twenty days. **[9]**

At a stated term, to wit, the November term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 6th day of February, in the year

of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court.

No. 15,878.

UNITED STATES OF AMERICA

vs.

ILLINOIS SURETY CO.

Minutes of Court — February 6, 1917 — Order Allowing Defendant to File Amendment, etc.

* * * * * * * *

Upon motion of Mr. West it was ordered that defendant may file an amendment to its amended answer.

* * * * * * * *

[10]

(Title of Court and Cause.)

Second Amended Answer.

Now comes the defendant, Illinois Surety Company, a corporation, and with leave of the Court first had and obtained, files this its second amended answer to the complaint on file herein, and denies, admits and alleges as follows:

I.

In answer to paragraph III of the complaint, defendant admits that one Pierre Grazi caused to be imported certain theatrical effects in the port and collection district of San Francisco, but this defend-

ant having no knowledge, information or belief sufficient to enable it to answer, denies that said Grazi imported and brought with him or imported or brought with him into the port and collection district of New York or brought with him in any port or collection district of the United States, except as hereinbefore admitted, the theatrical effects mentioned in the complaint or that said theatrical effects were contained in three chests, sixty-three trunks, seventy-six cases, thirteen baskets, nine boxes, six bundles, three valises and ten hampers, but avers that the theatrical effects which the defendant admits to have been imported by said Pierre Grazi were entered by said Pierre Grazi in the port and collection district of San Francisco and there and then so entered, imported, valued and estimated and appraised in the presence of the plaintiff and defendant at the sum of Five Thousand ($5,000) Dollars, and no more.

II.

This defendant has no knowledge, information or belief sufficient to enable it to answer paragraph IV of the complaint and placing its denial upon that ground, denies that said theatrical goods and effects were imported otherwise than by defendant specifically admitted in the preceding paragraph, and further **[11]** denies that they were brought by the said Pierre Grazi under an immediate transportation order from the port of New York or brought at all by him, the said Pierre Grazi, to the port of San Francisco.

III.

The defendant denies that the said goods and ef-

fects were imported as set forth in the plaintiff's complaint, but avers that they were imported as by his answer specifically alleged and further avers that said goods were appraised as alleged in paragraph I of this answer, the same being according to law, and the defendant denies that the value thereof was fixed at the sum of Fifteen Thousand Five Hundred Fifty-eight ($15,558) Dollars, as alleged in paragraph V of said complaint, or at any sum larger than the said sum of Five Thousand ($5,000.00) Dollars, as aforesaid, and denies that the amount of duty thereon calculated according to law, or at all, was Nine Thousand Seven Hundred Twenty-six ($9,-726.00) Dollars, or any further or greater sum than the legal duty would be upon said estimated and appraised value of said goods, to wit, Three Thousand ($3,000.00) Dollars.

IV.

In answer to paragraph VI of the complaint, defendant admits that it executed as surety the bond therein set forth, but denies that said bond was delivered as alleged or at all, and avers that said bond is null and void and of no force and effect.

V.

Answering paragraph VII of the plaintiff's complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer and placing its denial on that ground, denies that the said Pierre Grazi was allowed to receive, or did receive, the said goods and theatrical effects on the faith of said bond of the defendant.

VI.

In answer to paragraph X of the complaint defendant has no [12] knowledge, information or belief sufficient to enable it to answer and placing its denial on that ground, denies that the sum of Six Thousand One Hundred Eight Dollars and Sixty-six cents ($6,108.66) was or is the duty on that portion of said goods not exported or delivered for exportation as set forth in said Complaint and denies that the defendant is liable for the sum of Six Thousand One Hundred Eight Dollars and Sixty-six Cents ($6,108.66), or any sum whatever, and denies that any part or portion of said sum or the whole thereof is due, owing and unpaid by the defendant to the plaintiff.

VII.

Said defendant alleges that before the said bond mentioned in said complaint was given and executed, the goods had been duly appraised upon true valuation and after execution of the bond said goods were then and there duly delivered to the said Pierre Grazi, but thereafter the said plaintiff, without any notice to the defendant, and without his knowledge or consent proceeded to and did purport to make an unlawful, false and fictitious reappraisal and revaluation of said theatrical goods and effects and reappraised and revalued same at sum far exceeding their true value and their true appraisement and at a sum far in excess of the amount mentioned in said bond as being their true value as duly appraised, and defendant further alleges that had the said

goods and effects been appraised or valued, to the knowledge of the defendant herein at any larger sum than that mentioned in said bond, to wit, the sum of Five Thousand ($5,000.00) Dollars, the said defendant would not have executed the said bond or allowed the said goods and effects to be delivered to the said Grazi on the faith of and under the security of said bond.

VIII.

This defendant further alleges that the bond given and executed by it was not so given and executed for the goods mentioned [13] in paragraph V of the plaintiff's complaint, but was in fact and in truth given for the goods mentioned in the said bond.

IX.

This defendant now further alleges that the goods and theatrical effects returned and delivered by the said Pierre Grazi were the goods and theatrical effects covered by the defendant's bond and the value of said goods and the lawful duties thereupon were equal in amount and the full amount of the value and the duties that could lawfully have been chargeable and levied upon all of the goods and theatrical effects mentioned in said bond of said defendant, and which were so entered, valued and appraised and so imported by the said Pierre Grazi as aforesaid under said bond.

X.

This defendant further avers that the alleged cause of action attempted to be set forth in the said complaint is barred by the provisions of the act of Con-

gress of June, 1874, Section 22, Federal Statutes Annotated, Vol. 2, page 761.

And for a second and further defense and in answer to the plaintiffs complaint on file herein, the defendant alleges:

I.

In answer to paragraph III of the complaint defendant admits that one Pierre Grazi caused to be imported certain theatrical effects in the port and collection district of San Francisco, but this defendant having no knowledge, information or belief sufficient to enable it to answer, denies that; said Grazi imported and brought with him or imported or brought with him into the port and collection district of New York, or brought with him in any port or collection district of the United States, except as hereinbefore admitted, the theatrical effects mentioned in the complaint or that said theatrical effects were contained in Three Chests, Sixty-three Trunks, Seventy-six Cases, Thirteen Baskets, Nine Boxes, Six Bundles, Three Valises and Ten Hampers, **[14]** but avers that the theatrical effects which the defendant admits to have been imported by said Pierre Grazi were entered by said Pierre Grazi in the port and collection district of San Francisco, and there and then so entered, imported, valued, estimated and appraised in the presence of the plaintiff and the defendant at the sum of Five Thousand ($5,000.00) Dollars, and no more.

II.

This defendant has no knowledge, information or

belief sufficient to enable it to answer paragraph IV of the complaint and placing its denial upon that ground, denies that said theatrical goods and effects were imported otherwise than by defendant specifically admitted in the preceding paragraph and further denies that they were brought by the said Pierre Grazi under an immediate transportation order from the port of New York or brought at all by him, the said Pierre Grazi, to the port of San Francisco.

III.

The defendant denies that the said goods and effects were imported as set forth in plaintiff's complaint, but avers that they were imported as by his answer specifically alleged, and further avers that said goods were appraised as alleged in paragraph I of this answer, the same being according to law, and defendant denies that the value thereof was fixed at Fifteen Thousand Five Hundred Fifty-eight ($15,558.00) Dollars, as alleged in paragraph V of said complaint, or at any larger sum than the sum of Five Thousand ($5,000.00) Dollars, as aforesaid, and denies that the amount of duty thereon calculated according to law, or at all, was Nine Thousand Seven Hundred and Twenty-six ($9,726.00) Dollars, or any further or greater sum than the legal duty would be upon said estimated appraised value of said goods, to wit, Three Thousand ($3,000.00).

IV.

In answer to paragraph VI of the complaint, defendant admits **[15]** that it executed as surety the bond therein set forth, but denies that said bond

was delivered as alleged or at all and avers that said bond is null and void and of no force and effect.

V.

Answering paragraph VII of the plaintiff's complaint, this defendant has no information, knowledge or belief sufficient to enable it to answer and placing its denial on that ground, denies that the said Pierre Grazi was allowed to receive or did receive, on or about the 11th day of November, 1911, the said goods and theatrical effects on the faith of the said bond of the defendant.

VI.

In answer to paragraph X of complaint defendant has no knowledge, information or belief sufficient to enable it to answer and placing its denial upon that ground denies that the sum of Six Thousand One Hundred and Eight Dollars and Sixty-six Cents ($6,108.66), was or is the duty on that portion of said goods not exported or delivered for exportation as set forth in said complaint and denies that defendant is liable for the sum of Six Thousand One Hundred Eight Dollars and Sixty-six Cents ($6,-108.66), or any sum whatever and denies that any part or portion of said sum or the whole thereof is due, owing and unpaid by the defendant to the plaintiff.

VII.

Defendant alleges that it made and executed the bond mentioned in said complaint upon the express agreement between all parties thereto and upon the representations of plaintiff and principal Grazi that

the goods had been theretofore lawfully entered, valued and appraised under and in compliance with the provisions, rules and regulations governing Custom Duties and particularly of the act of Congress, Chap. 6, of 1909, known as the Tariff Act of 1909, and more particularly of sub-section 656 thereof, mentioned in paragraph VI of plaintiff's complaint, and defendant **[16]** further avers that if the said goods were not so lawfully entered and truly valued and appraised it, the said defendant did not know it, but the said plaintiff required full knowledge before their delivery by said plaintiff to said Grazi, that they had been unlawfully entered and unlawfully undervalued and underappraised to the extent of the difference of Three Hundred (300) per centum. That said plaintiff had there and then full knowledge that said bond was not made and executed to cover, nor did it cover, any such excess of valuation, or appraisement and that this defendant had no knowledge or notice thereof and did not consent thereto and that notwithstanding said plaintiff thereafter, without notice to the defendant, and without his consent, and unbeknown to him delivered said goods and effects in part to said Grazi, and in part to other parties, to the defendant unknown.

VIII.

This defendant further alleges that the bond given and executed by the defendant was not so given and executed for the goods mentioned in paragraph V of the plaintiff's complaint, but was in fact and in truth given for the goods mentioned in said bond.

IX.

This defendant further alleges that the goods and theatrical effects returned and delivered by the said Pierre Grazi to the plaintiff were the goods and theatrical effects covered by the defendant's bond and the value of said goods and the lawful duties thereupon were equal in amount and the full amount of the value and duties that could lawfully have been chargeable and levied upon all of the goods and theatrical effects mentioned in said bond of said defendant and which were so entered, valued and appraised and so imported by the said Pierre Grazi as aforesaid under said bond. **[17]**

X.

This defendant further avers that the alleged cause of action attempted to be set forth in the said complaint is barred by the provisions of the act of Congress of June, 1874, section 22, Federal Statutes Annotated, Vol. 2, page 761.

AND for a further separate and third defense in answer to plaintiff's complaint, leave of the Court being first had and obtained by the defendant during the trial of the cause, to make and file the said defense, the defendant alleges:

I.

Denies each and every allegation contained in paragraph III of plaintiff's complaint.

II.

Denies each and every allegation contained in paragraph IV of plaintiff's complaint, save and except that on the 11th day of November, 1911, said

Pierre Grazi entered at the port and collection district of San Francisco, in the State and Northern District of California, under Entry No. 15,888, certain goods valued at Five Thousand ($5,000.00) Dollars, upon which the duty was estimated at Three Thousand ($3,000.00) Dollars, but alleges that said entry was a warehouse entry.

III.

Denies each and every allegation contained in paragraph V of the plaintiff's complaint.

IV.

Defendant admits that he signed the bond set forth in plaintiff's complaint, but avers that the plaintiff did materially modify and alter the conditions of said bond with and in favor of said Pierre Grazi and without the express assent of this defendant in that said plaintiff did, without the assent of the defendant, as aforesaid, give and grant to said Grazi a second and further extension of six months for the redelivery and exportation of the goods and effects in said bond mentioned. **[18]**

V.

Denies each and every allegation contained in paragraph VII of plaintiff's complaint.

VI.

Denies each and every allegation contained in paragraph IX of plaintiff's complaint save and except that more than three years have elapsed since the execution of said bond.

VII.

Denies each and every allegation contained in

paragraph X of plaintiff's complaint.

WHEREFORE, the defendant having fully answered, prays to be hence dismissed with its costs.

T. C. WEST,
FERNAND de JOURNEL,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

T. C. West, being duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated upon his information and belief, and as to those matters he believes the same to be true. This verification is made by this affiant for the reason that the head office of the defendant corporation is outside of the county in which this affiant has his office, to wit, in the city of Chicago, State of Illinois, while the office of this affiant is in the City and County of San Francisco, State of California.

T. C. WEST.

Subscribed and sworn to before me, this 10th day of February, 1917.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California. **[19]**

Service of a copy of the within Second Amended

Answer is hereby admitted the 10th day of Feb., 1917.

JNO. W. PRESTON,
Assistant United States Atty.

[Endorsed]: Filed Feb. 10, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[20]**

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 6th day of February, A. D. 1917, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties, Ed. F. Jared, Assistant United States Attorney, appearing on behalf of the plaintiff, and T. C. West and F. De Journel, Esqrs., appearing on behalf of the defendant; and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having filed its memorandum opinion and ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of $6,000.00, together with interest at seven per cent per annum from April 19, 1915, and for costs:

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that United States of America, plaintiff, do have and recover of and from Illinois Surety

Company, a corporation, defendant, the sum of Six Thousand Seven Hundred Ninety-eight and no/100 ($6,798.00) Dollars, together with its costs herein expended taxed at $29.10.

Judgment entered March 13, 1917.

WALTER B. MALING,
Clerk.

A true copy. ATTEST:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Mar. 13, 1917. Walter B. Maling, Clerk. **[21]**

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 15,878.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,
Defendant.

Memorandum on Merits.

RUDKIN, District Judge.

This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi, conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the collector of the port of San

Francisco, and enter the same for exportation from the United States within six months from the date of importation.

It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel, that such properties arrived in the port and collection district of New York, in the State of New York, on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of $5,000.

For reasons not entirely clear from the record, two bonds were executed to the Government at that time, by the importer, Grazi, and the defendant company. The first for $10,000, under [22] section 2899 of the Revised Statutes, which provides that the collector may, at the request of the owner, importer, consignee or agent, take bonds with approved security in double the estimated value of the merchandise imported, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The second for $6,000, under paragraph 656 of the Tariff Act of August 5, 1909 (Fed. Statutes, Annotated, Supp. 1909, page 794), which provides as follows:

"Professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of arrival, of persons emigrating to the United States; but this exception shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons or for sale, nor shall it be construed to include theatrical scenery, properties and apparel; but such articles brought by the proprietors or manager of theatrical exhibitions arriving from abroad, for temporary use by them in such exhibitions, and not for any other person, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment of the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation; Provided, that the Secretary of the Treasury may, in his discretion, extend such period for a further term of six months in case application shall be made therefor."

After entry, the goods were appraised according to law and the valuation fixed at $15,558. The duty thereon computed according to law was $9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof of the ap-

praised value of $3,617.34 were delivered to the Collector and exported; but the balance of the goods, subject to a duty of $6,108.66, have never been exported from the United States or delivered over for exportation. **[23]**

Although there is little controversy over the material facts, numerous defenses were interposed at the trial of which brief reference will be made.

It is first contended that the existence of the other bond in the sum of $10,000 given under section 2899 of the Revised Statutes avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was taken. That bond is only required where goods are delivered to the consignee pending inspection and appraisement. Here, there was no delivery of the goods to the consignee until delivery was made under the bonds in suit, so that the former bond never became operative, never served any purpose, and cannot defeat the present action.

Again, it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless, they were so admitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again, it is claimed that the Government should have forfeited the goods for undervaluation. But I apprehend the right of forfeiture was given for the protection of the Government, and not for the protec-

tion of the importer or his surety.

It is suggested that the goods were not delivered to Grazi, but to members of the troupe. The delivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe with his consent and acquiescence was equivalent to a delivery to him.

It is claimed that the surety was released by an unauthorized extension of the time for exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. **[24]** The only evidence of such extension is a notation on the face of the bond made some time after its execution, but by whom or when made, is not disclosed. The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter.

Some complaint is made as to the manner in which

the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it effected the substantial rights of the parties.

As already stated, the bond is not conditioned as required by law, as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in the United States vs. Dickerhoff, 202 U. S. 302:

> "While the statute does not provide the express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se,* it is a valid bond, although not in terms directly acquired by the statute.

Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. **[25]** It has breached that condition and the loss to the United States exceeds the penalty of the bond.

On the whole I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond, and judgment will go in its favor for the amount of such penalty.

[Endorsed]: Filed March 13, 1917. Walter B. Maling, Clerk. **[26]**

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

Before Hon. FRANK H. RUDKIN, Presiding.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,
Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED: That on the 6th day of February, A. D. 1917, the above-entitled cause came on for trial, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties, Ed. J. Jared, Esq., Assistant United States Attorney appearing on behalf of the plaintiff, and T. C. West and F. de Journel, Esqrs., appearing on behalf of the defendant.

THEREUPON the following proceedings were had:

Testimony of C. L. Marple, for Plaintiff.

C. L. MARPLE, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I am now and have been for close to 28 years a clerk in the office of the collector of customs at the Port of San Francisco, California. I was such during the year 1911. Now handed to me is an Entry

(Testimony of C. L. Marple.)

for immediate transportation in bond of passenger's baggage without appraisement, with the number 511, which is a record of the collector's office. [27]

The plaintiff offered the said document and the same was admitted in evidence and marked "Plff. Exhibit 1" and the said original exhibit is hereto annexed and made part of this bill of exceptions.

WITNESS.—(Continuing.) This is an entry covering 183 pieces of baggage that arrived with the passenger on the steamer "Caroline" from Havre, France, and this baggage was transported under bond to San Francisco, to the care of the collector, for entry at San Francisco, on a bond which is of course provided by the regulations. It is consigned to the collector of customs, San Francisco. Apparently, Pierre Grazi was the consignee of these goods. This entry is dated November 4th, 1911, the date of the arrival of the vessel.

The COURT.—Q. That was an entry made in your office here in San Francisco?

A. There is an entry based upon this. I understand that the 4th of November was the date the goods arrived in New York and the entry was made at the same time. It is here stipulated that the 183 packages of merchandise covered by Plaintiff's Exhibit No. 1 are the same as those set out in the complaint. The affidavit attached hereto, on the entry, this white sheet, was presented to the acting deputy collector of customs, at the customs-house, duly signed by the importer, and received a number, the entry number; it is duly sworn to before the Acting

(Testimony of C. L. Marple.)

Deputy Collector, T. J. Barry, by Pierre Grazi, the importer. The penal bond is filled out and signed by Grazi as principal, and the Illinois Surety Company as surety. This is the penal bond for redelivery within ten days after return of the appraisement. This entry is the official entry of the merchandise in San Francisco, in the custom-house and is the entry upon which the amount of duty has been determined by the liquidating [28] clerk. That liquidation is based on the United States Appraiser's advisory classification of the different items, and I find the clerk has applied the proper rate of duty as provided for in 1909, and it was brought into this slip of paper attached. The duty here amounts to $9,726.16.

Objected to by defendant as not being the official liquidation and not the original liquidation and not the best evidence, which objection the Court overruled, to which the defendant excepted and which is herein designated as error No. I.

The COURT.—Q. Is that the first appraisement or the last?

A. The only appraisement.

The COURT.—Q. I thought you said the duty under the first appraisement was $5,000.

Mr. JARED.—Yes; that was estimated by the importer and the duty we showed upon it amounted to this. He made what was called a consumption entry.

WITNESS.—(Continuing.) The amount of duty

(Testimony of C. L. Marple.)

upon the goods, determined upon the liquidation was $9,726.16.

There it was stipulated between plaintiff and defendant that of the goods imported and entered a certain amount was redelivered to the collector of customs and exported amounting in value to the sum of $5,852 upon which the duty was $3,617.34.

According to the record, I know that Mr. Grazi got possession of these goods—

Defendant's counsel interrupting witness objected thereto as being immaterial, irrelevant and incompetent and assuming something not in evidence, there being no evidence showing that Grazi ever got these goods; which objection was overruled and defendant excepted.

The COURT.—He is asking if he knows. The witness was going to speak from the record. That is apparently the only information [29] he has.

Which above ruling defendant designated as error No. 3.

WITNESS.—(Continuing and answering question.) Grazi apparently got the goods at the date of entry. I have no personal knowledge.

Cross-examination.

The official return of the appraiser is noted on the invoice; I believe it is dated January 8th, 1912. The importation was November 4th, 1911. These figures are based upon the return made on the invoice, and of course we were in possession of the entry some time in the liquidation department, but the liquida-

(Testimony of C. L. Marple.)

tion was officially made as per date stamped on the entry, which is September 4th; this is the official date of liquidation, September 4th, 1913.

The COURT.—Q. That was almost two years after the importation?

A. Yes. I mean by that, that while the duties were not computed and carried out in detail until September 4th, 1913, the goods were actually appraised sometime between the 11th of November, 1911, and January 8th, 1912. From the records they were during that time at the Valencia Theatre. The records available to me do not show that any person connected with the customs department was in charge of the goods. It is not the custom that someone will remain in charge when the special privilege was given to make the examination at the Valencia Theatre and said privilege was given by William B. Hamilton, special deputy. I understand that it is the practice to exact from the importer fees where the examination is made at other places than the Appraiser's Store. I should judge that it then follows, of course, that there would be some one of the customs officials out there in charge of these matters until the appraisement was complete. I know the mode followed by the customs officials. I have no reason to believe that any different custom was followed in this case than would be in any outside examination. [30]

I did not say that I knew whether or not any one was in charge of these goods. This was outside of my particular duty. Mr. Maguire could tell you

(Testimony of C. L. Marple.)

who knew that, in the customs department.

The COURT.—Q. Does the Government surrender possession of these goods when the bond is taken?

Argument by respective counsel.

Mr. JARED (to Witness).—Are you familiar with the ten-day bond that was given in this case? Just state the object of that bond if you know.

Objected to by defendant because the bond will speak for itself and can be construed in court as well as by customs officials, which objection was overruled by the Court, to which defendant excepted, which is ruling designated as error No. 4.

WITNESS.—(Continuing.) This penal bond was given for the return to the government's custody of any of the goods or effects in the possession of the importer up to and including ten days from the official return of the appraiser. The official return of the appraiser was made sometime in January, 1912; this bond lives for ten days after the date of that return; it then expires. The return dated September 4th, 1913, is the liquidation based on the appraiser's return of January 8, 1912. This bond does not last until ten days after the liquidation of the articles, but lasts until ten days after the return of the appraiser, that is noted on the invoice. This is the official invoice. There is the date of the official return, January 8th, 1912. This $10,000 bond was good for ten days after that.

Testimony of James W. Maguire, for Plaintiff.

JAMES W. MAGUIRE, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I am from the appraiser's office and have been connected with it for 25 years. My duty there is to examine and appraise imported merchandise. This *pro forma* invoice and supplement to it dated on the back November 11th, 1911, No. 15,888, [31] was filed in our office. This invoice consists of a tabulated statement of the contents of the packages that were examined at the Valencia Street Theatre after November 11th, consisting of 183 packages of the Grazi Opera Company. The original document is the first sheet of this paper. It consists of *pro forma* invoice lumping 183 packages, without specifying the contents of any of the packages, at a valuation of $5,000. That was the value placed by the importer. I made a statement to the people of the opera company that I would refuse to accept this paper and that we would have to have a detailed statement of each particular package. Then they furnished me a memorandum in French. The different people did that—Mr. Grazi and the different members of his troupe. Each one furnished me an entirely different list of their own particular possessions. I did not raise the unit of value of any of those articles that were submitted to me, but the gross amount of the merchandise covered was in excess of the amount that the importer declared on entry. I did not fix the value, each statement had a value attached to it.

(Testimony of James W. Maguire.)

Those values aggregated the amount that I finally returned. It was something like $15,000 and some odd. I went out to the opera house on Saturday afternoon and was asked to come again on Sunday. These packages came by freight from New York, and by some mishap or bungling on the other end of the line, all the personal effects of the entire troupe, of over 100 people, were in this baggage-car; so they had nothing at all, no change of wearing apparel, no change of underclothing; on Sunday we went out there and made an examination, and I allowed these people to take their own personal belongings; in the trunks they had the individual costumes that belonged to the individual actors; they took those and took them to the hotel where they lived. I met Mr. de Journel while this transaction was going on. It is my impression that Mr. de Journal did all [32] the typewriting on these papers in this supplemental list, or had it done in his office, I gave him the pencil memorandum and he made up this list for me. I do not think there is any article in that invoice that is not subject to duty. Everything here is simply and purely theatrical effects. I do not remember the date that I was up at the theatre a time or two. It was immediately after the arrival of the goods and before they were opened. I do not know what time those goods were delivered over to the theatrical company nor do I know the date. As I said, the different stars had baggage in their own apartments in different hotels where they were living, of their own particular effects; that is the theatrical effects that

(Testimony of James W. Maguire.)

belonged to them. The stock for the chorus was in storage in the room specially built on the stage of the Valencia Theatre. I do not know where the goods were taken to after they were taken out of the theatre.

Cross-examination.

By some mistake some of the private wearing apparel of the people of the troupe was in the same car. The invoice shows the number of packages that there were in that car. This first paper referred to as being the *pro forma* invoice of Mr. Grazi, states all the packages; 183 packages that were in that car; it does not give the detail of the contents of the packages. In some of the trunks there were personal effects of the individuals.

Q. I am talking about some of these packages which contained wearing apparel only and no theatrical goods. That was in the 183 packages, was it not? A. That is my impression; yes.

Q. As a matter of fact all that they did with these grips and packages and hampers that were not theatrical goods, was that upon being opened they were turned over to them because they were not dutiable. Is not that the fact? [33]

A. Everything that belonged to the personal members of the troupe were opened that day, and in some of the packages were also theatrical effects that belonged to the individuals; the stars had their own costumes and these costumes were taken to their hotels, and the only portion of the theatrical effects that remained in the theatre were the effects that

(Testimony of James W. Maguire.)

they had in the little room, and that belonged to the chorus—chorus costumes.

The COURT.—Q. That would not amount to much?

A. I don't really remember how much it amounted to; of course the ballet did not amount to much. I do not claim that these 183 packages were all theatrical costumes. I do not know; I do not remember, whether or not some of them had no dutiable costumes or dutiable theatrical goods in them at all. I could not remember of the three valises. I would not say at the present time whether those bundles contained theatrical goods or not. I know that some of these cases contained wearing apparel, private wearing apparel of the people which I turned over to them, also the whole contents of the packages. I allowed these people to take this out of their trunks, away from the theatre on that day. I am pretty certain. I know this much, that the inspectors that were there said: "Now they can take that package," and I said: "They can take that package." They probably would be the men to tell you in detail what effects they did take.

The COURT.—Q. Have you any personal recollection of it, Mr. Maguire?

A. My impression is that they took them. I refer to the theatrical dutiable goods. Those of the individual stars, they took them away. That is my impression now. I do not refer now to the delivery to the people, on the 8th of January of the other goods. I mean this was on Sunday, that Sunday I went

(Testimony of James W. Maguire.)

there; I forget the date; it was in November, [34] because these people were in such stress for a change of clothing; they probably did not take them until Monday, but on Sunday I was there.

The COURT.—Q. It was after arrival here?

A. Yes, they were on the stage.

It is my statement that their theatrical goods were delivered to them. When I say that you did the typewriting of this invoice (to Mr. de Journel) I mean that it was done by your office. I do remember that I requested somebody to attend to that and that you took a typewriter to do it. It had to be translated from French, from the original memorandum I had; you translated it and put it in that form. The first pages of that invoice represent the stock or in other words the costumes for the chorus that was kept on the stage of the theatre. I do not remember requesting that a special room be built with a lock and key on it and that all these things be put in there, but there was a room of that description there. I was not responsible for it at all. I remember that room; it was a room that was covered with canvas, a big lock on the door; it was not secure from thieves; they could go through the canvas and abstract anything in the room, if they wished. I do not remember that a man was kept there night and day, from the custom-house—two men. That had nothing to do with my department. My department was the appraisement of these goods. I do not remember the date that we were through with the appraisal; we had great difficulty in getting these different lists from the differ-

(Testimony of James W. Maguire.)

ent people. My final return of invoice will show the date.

The COURT.—Q. That is the 8th of January?

WITNESS.—(Continuing.) It would not show the return of the individual appraisal of the artists' goods; it is all together; that is the final return of the invoice. I did not say that after I appraised the artists' goods they took them to their hotel. [35] I said this; that when the trunks were opened on the stage, on account of the people needing their clothing, that we let them take their trunks, and in those trunks were some of these costumes. I just said that in those trunks they took to the hotel also were personal effects and stage costumes. It was either Sunday or Monday; we examined them on Sunday. They were not appraised then but we glanced over them. I had them fixed in my mind, in a way, what they were. I do not go to the respective hotels, to finish my appraisement of the goods. I saw these goods after that Sunday. I saw them at different times on the stage when the actors were wearing them; on the back of the people wearing them; that is a very good way to see them. The only appraisal that was done about these goods was prior to their being delivered to them on that Sunday and when I glanced over them when they were wearing them, and also by my assistants; some assistants were helping me, as you will remember. That is the only appraisal that was done about these artists' goods. As to the stock goods they remained there at the theatre and we went through them very shortly; I

(Testimony of James W. Maguire.)

think we looked at them very soon after they were packed and placed in this room. I did not find out on the 8th of January that there was $15,888. I did not figure up the invoice at all. The liquidating department figured that. Mr. Marple here is the gentleman who knows about that.

The COURT.—Q. A mere matter of computation from your figures, was it?

A. All we did, Judge, was to certify to the quantity and unit of value; we did not compute the total amount.

The COURT.—Q. I say the total amount is a mere matter of computation? A. That is all.

WITNESS. — (Continuing.) (To Counsel.) I knew by the *pro forma* invoice that these goods had been valued at $5,000.

Q. You knew equally well they were worth $15,888. [36]

A. I did not figure it up.

Q. You never knew that at all?

Mr. JARED.—This is simply arguing with the witness.

Mr. de JOURNEL.—I want to show to the Court that the department knew before the delivery of the goods they were worth $15,888.

The COURT.—The witness told you he never computed the amount at all.

Mr. de JOURNEL.—I want to know when the department acquired knowledge of the fact that these goods, valued at $5,000 by the importer, were really worth $15,888, and he knew it.

(Testimony of James W. Maguire.)

WITNESS.—(Continuing.) They knew after I returned the invoice. The 8th of January. Until the 8th of January the collector's office did not know.

Re-examination by Mr. JARED.

The red writing on that supplemental invoice is the classification of the article in the hands of the United States, and that was all done in my writing. The tariff law requires it. I said a few minutes ago that Mr. de Journel had something to do with furnishing that supplementary list. That supplementary list that was furnished indicate the value of these articles. I did not raise the value of these individual articles, the units at all.

Mr. JARED.—Q. Then your appraisement was done, as you said a little while ago, by looking at the garments and taking, also, the supplementary list of values furnished by Mr. Grazi and Mr. de Journel; is that true? A. Yes.

Mr. de JOURNEL.—He did not say I furnished anything. He said my office furnished some typewriting.

Mr. JARED.—Q. State whether or not Mr. de Journel was interested, and if he was around, what part he took in the transaction.

Mr. WEST.—We object to that as immaterial, irrelevant and [37] incompetent; there is no evidence here to show that Mr. de Journel at any time to that time or long after represented the Illinois Surety Company.

Mr. JARED.—Mr. de Journel would not dispute

(Testimony of James W. Maguire.)
that, I suppose, that he represented not only Grazi but the Illinois Surety Co.

Mr. de JOURNEL.—I dispute that I represented anybody in this matter; I represented Mr. Grazi, to do some interpreting for him, and to advise him in a legal way, but I had nothing to do with this. As to that evidence, I will ask that it be subjected to being stricken out, if it is not connected up.

WITNESS.—(Continuing.) Mr. de Journel was a great help to me out there. I showed him these French papers and memoranda, and he took them and made a transcript; some of them he handed to me in person, and some he sent to me. I don't remember whether he did tell me exactly who he was representing, but I understood Mr. Grazi. Upon that supplementary invoice furnished me I made the appraisement, as well as the examination of the goods. Counsel for defendant there moves that the evidence attempted to F. de Journel assistance with the Illinois Surety Company be stricken out upon the grounds that it was not so connected, that the defendant was the Illinois Surety Company only that witness testified to said de Journel was attorney for Grazi and did not testify that he was made attorney for the Illinois Surety Co.

The COURT.—The testimony will stand until final argument.

To which defendant excepted; which ruling is designated as error No. 5.

Mr. JARED.—I want to introduce the supplemental invoice.

Admitted and marked Plffs. Exhibit 3.

Testimony of C. L. Marple, for Plaintiff (Recalled).

C. L. MARPLE, a witness for the plaintiff being recalled by said plaintiff, testified in substance as follows:

The liquidation was made upon the invoice as presented to the collector by the appraiser, with all of these attached sheets. The exhibit that you hold, Plffs. Exhibit 3.

Testimony of Robert Todd, for Plaintiff.

ROBERT TODD, a witness called and sworn on behalf of the plaintiff, [38] testified in substance as follows:

I am from the adjuster's office—the same office as Mr. Marple—adjuster of duties. I have been in that position 8 years. I am a clerk. I recall that our office gave a notice of the liquidation. I have the record of the liquidation and can give the date. The book that I am reading from is a record of liquidations that are entered here, posted daily, on a bulletin-board.

The COURT.—Q. Notice to the importer?

A. Yes. Notice to the importer, notice that it was being liquidated during the day.

The COURT.—Q. What is the date of the notice?

A. The date of this notice is September 4th, 1913.

Mr. JARED.—Q. What was the notice?

Mr. WEST (to Witness.)—Is the notice written?

A. The notice was written.

Mr. WEST.—The notice will speak for itself.

WITNESS.—(Continuing.) This is the official

(Testimony of Robert Todd.)

record of liquidations which are recorded here as the liquidations take place from day to day. From this book a copy was made by me of the exact liquidations as they took place. This copy was posted on the bulletin-board on the general floor of the customs-house; in other words, notice to the importer.

Mr. JARED.—Q. What does that notice consist of?

Mr. WEST (to Witness.)—Q. Have you got that notice? A. No.

Mr. WEST.—We object to that as immaterial, irrelevant and incompetent. The notice should be produced.

WITNESS. — (Continuing.) The notice was placed on the bulletin-board on the day of the liquidation, usually in the afternoon before the close of business, and remained there for a period of, I should say, two weeks, after that time they were usually taken or taken down and used; we have been accustomed to use them for [39] office paper.

The COURT.—Q. They are not preserved?

A. No, they are not preserved. I know of my own personal knowledge, from leaving my record there, that notice was put up.

Mr. JARED.—Q. What did it consist of?

Mr. WEST.—At this time we interpose the objection as irrelevant, immaterial and incompetent, because this is not the notice that is contemplated by law; the law says it shall be mailed to the last known address of the importer. There is no provision in

(Testimony of Robert Todd.)

the law for posting of this notice that we have been able to find at all.

Which said objection of the defendant was overruled by the Court, to which the defendant excepted, which ruling is designated as error No. 6.

Cross-examination.

WITNESS.—This one here is the entry. This liquidation duty we have here $9,726.16; those figures were taken from the original entry. Yes, taken from the original entry. That is the liquidation that is made out here; yes, taken from the entry. I mean by the original entry the original entry such as you have there. The original entry is the document that is shown here—the figures referred to here—when this estimate was put down at $3,000. I took the figures of this $9,726.16 from the entry.

The COURT.—Q. From the report for the appraisers?

A. Of course it eventually came from the appraisers, but I took that—that is figured in the collector's office. After the appraisement. It is taken from the record of the appraisal.

The information for this figure was derived from these papers which show this duty to be $9,726.16 from the entry. The entry that I got it from was made on November 11th, 1911. [40] This entry of November 11th, 1911, showed the liquidated amount of the duty amounted to $9,726.16.

The COURT.—Q. The liquidation was made until after that date, though, was it? At least it was not reported to your office?

(Testimony of Robert Todd.)

A. The liquidation, what we would call the final liquidation, was on September 4, 1913; that is the record of official liquidation.

Mr. WEST.—Q. Was there anything in the customs office as of date November 11th, 1911, to indicate in any manner, then, that the duty of these goods was $9,700 and odd?

A. That is a question that I could not answer; that would be up to other officials.

Q. Is it not a fact that the entry of November 11, 1911, according to these figures here, showed the duty to be $3,000?

A. It showed the estimated amount of duty.

Q. That entry of $3,000 is a figure that is derived from the papers of November 11, 1911?

A. That is from the date of entry, but the other comes from the liquidation of the invoice.

Mr. JARED.—I want to ask you: I hand you here a *pro forma* invoice and liquidation attached thereto: Did you have that in your possession at the time, before you made this entry?

A. Yes, that is where I made my entry based upon that liquidation, from this entry.

The COURT.—Q. Why was the entry made so long afterwards?

A. That would be up to somebody else to answer that.

Mr. JARED.—I want to read this into the record. In the Column "Entry No," 158 in the column "Importer" Pierre Grazi. In the column "Name of Vessel" rail. In the column "date of Entry"

(Testimony of Robert Todd.)

November 11, 1911. In the column "Estimated duty" $3,000. In the column "Liquidated duty" $9,726.16. That is from the customs-house record, on page headed "Record of entries and estimated [41] duties" on one page, and then on the next page, right hand, "Liquidated September 4, 1913," and in the column "Date of payment" it is vacant.

Mr. de JOURNEL.—It should not be that much there, because we paid $3,617, and it is not recorded there; by way of returned goods.

WITNESS.—(Continuing.) I said that on the 4th of September, 1913, following this entry, I posted a notice at the customs-house. That is all I did in connection with the notice. It was my duty to make these entries in this book.

I was the only person authorized to do it at the time, and the only person who at the time was authorized to post the notice. No one else in the office did anything of that kind. If any notice was given, the notice I gave was by posting.

Testimony of Thomas W. Scott, for Plaintiff.

THOMAS W. SCOTT, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

(Interrogated by Mr. BROWN.)

I am employed in the customs service in San Francisco. I have been employed here over 30 years. I have been the bond clerk for the last ten years.

Mr. JARED (to Counsel for Defendant).—Will you admit the execution of that bond and delivery

you admitted in your answer as to the execution of it?

Mr. WEST.—We will admit this is the signature of the Illinois Surety Company.

Mr. JARED.—We will go ahead and prove it then.

The COURT.—Is the execution of the bond denied?

Mr. JARED.—They deny in their amended answer that it was delivered, and we were just introducing this to show it.

Mr. WEST.—You are not offering the bond in evidence now?

Mr. JARED.—No.

The COURT.—I think the possession of the bond by the Government is *prima facie* evidence of delivery. [42]

Mr. WEST.—We will admit that they got that bond on the 11th of November, 1911.

Mr. BROWN.—Will you admit the delivery?

Mr. WEST.—We handed it over to the Government. I suppose that will be sufficient.

The COURT.—If the bond was handed over to the Government, that is delivery, all right.

Mr. de JOURNEL.—To make it plain, there is just this point: that there was at that time only the one bond for $10,000 and this bond was to take effect after the other bond had lapsed, because the consideration of this bond was the delivery of the goods to Grazi; so, if we can prove that these goods were not delivered by the custom-house officials until January 8th, 1912, although they had the custody of

this bond, as they had also the custody of the goods, there could not be an actual delivery of the bond, so that there was no consideration for the bond to put it in force and effect.

Mr. JARED.—I assume that the defendant admits the delivery of this bond sued on.

Mr. WEST.—No. Looking at this bond now, this is not the bond sued on at all. There are things in this bond not in ours.

Mr. BROWN.—You have a copy of the bond?

Mr. WEST.—It is not this one at all.

The COURT.—If you admit that the bond was signed by you and turned over to the Government, that is all the Government is able to prove, anyhow.

Mr. WEST.—Yes; we will reserve the right to object to this bond if this is what they are going to base this case on—we reserve the objection to the admissibility of that document, because it is not the document referred to in the pleadings.

The COURT.—If you admit the one referred to in the pleadings, [43] I do not care what the books shows.

To which ruling of the Court the defendant excepted and which ruling is designated as error No. 7.

Mr. WEST.—We do not admit the efficacy of it. We admit it was delivered.

THE PLAINTIFF RESTS.

Mr. WEST.—May it please your Honor, just before the noon adjournment, so as to make the record clear, we admitted that the defendant executed a certain bond, but when the bond was produced here

I notice that it is not the bond that is referred to in the pleadings, and relying on paragraph 4 of our answer, I am going to ask your Honor to indulge me in withdrawing the admission of delivery. Of course, we admit there was a bond executed along the terms of the pleading here, but in paragraph 4, on page 3 of the amended answer, we allege as follows:

> "In answer to paragraph 6 of the complaint, defendant admits that it executed as surety, the bond therein set forth but denies that said bond was delivered as alleged or at all, and avers that said bond is null and void and of no force and effect."

So I would like to withdraw the admission that the bond was actually delivered, in so far as the word "delivered" has any legal significance.

The COURT.—I did not understand that you admitted it was legally delivered; you admitted it was passed over to the Government, however.

Mr. WEST.—That was my understanding, but for fear the Court did not understand that entirely, or was misled by that, we admit that the Government has it in its possession, but the delivery of the bond we do not admit.

Mr. BROWN.—The paper was physically delivered into the custody of the collector, was it not?

Mr. WEST.—Of course, the paper was physically delivered [44] to the Government.

Mr. JARED.—We had on the stand Mr. Scott, to prove by him and also to put in evidence the original

bond, and if that is denied, that the bond that we have set in our pleading—

The COURT.—He admits that was handed over.

Mr. WEST.—Do not be deceived on this point, Mr. Jared; we do not admit that the bond that you have produced to-day is the bond referred to in this pleading at all, because there are some changes in that bond since we signed it.

The COURT.—You admit the execution of the bond which is attached to the complaint; whether that is the same one that is offered in evidence or not, I dont know.

Mr. WEST.—It might be compared with the other, because it might make a difference in the proof, on account of the change made since signature.

The COURT.—You admit specifically the execution of the particular bond which is attached to the complaint.

Mr. WEST.—Yes. We will call on the Government at the proper time to produce this bond that we executed.

The COURT.—Under the pleadings, of course that is not in issue at all. You admit you executed a bond?

Mr. WEST.—We admit we executed a bond in this form, but if it is shown for the first time that this bond was changed since we executed it, then, of course, that would have the legal effect of releasing the surety, and we might have to ask leave to amend the answer.

The COURT.—That is not the defense you have interposed at all; on the contrary, you have expressly admitted the execution of the particular bond attached to the complaint.

Mr. WEST.—In case the evidence shows that this bond that they have has been changed, because it has been changed without our knowledge or consent, then of course we are going to ask leave to amend our answer to conform with the [45] proof.

The COURT.—You would have to ask leave first, because the proof would not be admissible until the pleadings were amended to meet that issue.

Mr. WEST.—At this time I ask leave to file an amended answer setting up that there has been a change in the bond referred to in the complaint, and the surety is released. I can file a formal answer.

Mr. JARED.—Will you state how it has been changed?

Mr. WEST.—I see by this bond in the pleadings it is stated that we gave this bond on the 11th of November to return these goods, a redelivery bond to return the goods in six months; it alleges that we had an extension of six months, bringing it up to the 11th of November, 1912. On the bond I saw this morning there is a further extension of six months. We do not know anything about that. We think they changed the conditions of the bond. If the Government changed it after signature, I think it releases the security. It might hold the principal but not the surety.

The COURT.—Do you mean that they changed the bond itself, or that they committed some act which released the surety?

Mr. WEST.—The exact facts are these, that on this bond that they produce this morning, it is not mentioned in the pleadings at all that there has been an extension granted for six months from and after the 11th of November, 1912, which was the expiration of the extension which we admitted in our pleading.

The COURT.—Is that in the bond, itself?

Mr. WEST.—In the bond itself. I just noticed that a moment before the adjournment. Defendant asks leave now to file a formal answer setting up that the bond has been changed since execution by the surety company. It might still [46] hold the principal but not the surety. We are only representing the surety company in this case.

The COURT.—Any objection to that?

Mr. JARED.—No objection.

Mr. WEST.—We ask leave to file an amendment; I now file a formal amendment.

The COURT.—Very well.

Mr. WEST.—With that clear in the mind of the Court I now at this time move for a nonsuit, and for judgment for the defendant on the following grounds: First, that this bond is not the bond contemplated by law. There is no authority for the Government to accept such a bond in view of the evidence that was produced at this trial in this, that the bond for redelivery could only be given by a person who actually accompanied the goods from the for-

eign country, on the identical ship that it comes in on. I am not quoting the authorities now; we will take them up later. That the evidence in this case shows that Grazi was here in San Francisco prior to the 11th of November, and that these goods came from France in the custody of one, Magagno.

The COURT.—That does not appear in the testimony up to date, does it?

Mr. WEST.—The affidavits produced show that. The documents show further that the owner of these goods was one Barisseau; that they came here accompanied by Magagno from Paris on a certain ship arriving in New York on the 4th of November, 1911, and that Grazi was here prior to that and did not accompany them upon that ship. The second ground is that the evidence shows that there was no delivery of these goods under the $6,000 bond.

The COURT.—As I said to you this morning, I would not grant [47] the motion for a nonsuit unless it was entirely clear that the Government had no case at all.

Mr. WEST.—I will state these grounds and will argue them later.

The COURT.—If you intend to rely on your motion, I will consider it, but if you intend to go ahead and offer your proof you will waive your motion for a nonsuit.

Mr. WEST.—I will state for the sake of the record the grounds.

The COURT.—If you go ahead and offer your testimony you waive your motion for a nonsuit.

Mr. WEST.—I quite realize that, but I will state them briefly. The second ground is there was no delivery under the $6,000 bond; if there was any delivery it was under the $10,000 bond which the evidence shows was given on the same date, and, therefore, there was no consideration for this $6,000 bond; third, that the evidence shows in this case that between the 11th of November and after the date the bond in question is given, and prior to the 8th day of January, 1912, the Government discovered that these goods were grossly underestimated, to wit, to the extent of about 300%, and that it became their duty to then confiscate these goods. Fourth, that the Government did not exercise the privilege at the time and confiscate the goods as shown by the evidence. Fifth, that the goods were never delivered to Grazi under any circumstances, or to the owners, as shown by the testimony; that the owners had made out lists showing what they owned, and upon these lists and the estimate they were delivered to the owners on or about January 8th, 1912. Sixth, that the Government had notice that Grazi did not own these goods at the time the bond was given on the 11th of November by reason of documents that accompanied them showing that they were imported by Magagno, and belonged [48] to Barisseau. They again had full notice of the appraisement that was made after the 11th of November and prior to the 8th of January, 1912. Those are the grounds of the motion for a nonsuit. Of course, there is a question of whether we waive them by introducing evi-

(Testimony of Charles T. Hughes.)

dence. I would like to make that motion at this time.

The COURT.—There is no question about the waiver of the motion. The motion will be denied. That is, I deny the motion under the assumption that you are going ahead with your proof. Of course, if you are going to rest on it I will hear from you.

Mr. WEST.—We will go on with our proof.

To which ruling of the Court the defendant excepted and said ruling is designated as error No. 9.

Testimony of Charles T. Hughes, for Defendant.

CHARLES T. HUGHES, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I was general agent of the Illinois Surety Company in the month of November, 1911. I remember giving, on the 11th of November, 1911, a bond on behalf of Pierre Grazi, in which the Illinois Surety Company was surety, for the redelivery of certain theatrical goods. That bond is for $6,000. Simultaneously with the giving of this bond two other bonds were given at the same time. One was a bond in the sum of $6,000 to produce the invoice, and the other was in the same form, a penal bond. The amount of the bond known as the penal bond was $10,000. I am familiar with bonding in these matters. I have had about twenty years' experience. I have not in mind the conditions of the bond for

(Testimony of Charles T. Hughes.)

$10,000. It is ordinarily known as a penal bond; my understanding of it, however, was that it was given to cover the period of appraisement, temporary period of appraisement [49] being made outside of the bounds of the warehouse or in the customs-house. (It is there admitted that the bond speaks for itself.) At the time that I gave that $10,000 bond on the same day I gave two $6,000 bonds, one for redelivery and one to produce the invoice. This redelivery bond shows in my own writing the signature of the Illinois Surety Company.

The COURT.—That is the original?

Mr. WEST.—Yes, I think it is.

WITNESS.—(Continuing.) At the time I executed this bond I don't think the notation was on it: "Ex. 6 months to November 11th, 1912." I think that refers to an extension thereafter granted. That was an extension that was granted at the expiration of the first six months. That is the second extension granted.

Q. In pencil marks here there are two notations, extended six months, to November 11, 1912. Now, I ask you as to this writing in ink. "Extended"—I don't know what that first word is—"Extended six months to June 11th, 1913"—was that on the bond at the time you executed it?

A. I could not positively say whether it was or was not. I have not any recollection of it.

Q. Mr. Hughes, there has been some evidence given this morning that this stuff was afterwards

(Testimony of Charles T. Hughes.)

appraised, was appraised prior to the 8th of January, 1912, liquidated apparently on the 4th of September, 1913; did you ever receive any notice that the stuff was appraised on September 4th, 1913, and the duties fixed at $9,000 and some odd?

A. No, I have not any knowledge of that. I think the first suggestion of liquidation or of the penalty was at the time of the demand from the collector of customs. I don't remember just when that was.

The COURT.—That was when the suit was commenced, was it? **[50]**

A. No, I think it was sometime previous to that. I think his letter was referred by me to the office of Gavin McNab, general counsel for the company, and thereafter there was some conference between the district attorney's office and McNab's office. I think it is quite sometime sooner than January 9th, 1915. It was in advance of three or four months before April, 1915, because there was a conference between the general counsel for the company and the district attorney. I think that the first intimation that I had that the goods had been appraised at $9,000 and that the duty on them had been fixed at ($9,000) was the demand by the Government for the payment.

The COURT.—That was long after the date fixed by counsel?

A. Yes. If I had received any notice I would have it in my files. I could not find any.

Q. Did you or did you not receive any notice on or

(Testimony of Charles T. Hughes.)

before September 4, 1913, that the duty on these goods was fixed at $9,000?

The COURT.—He has answered that question.

Mr. WEST.—As long as that is clear in your Honor's mind, very well.

WITNESS.—(Continuing.) At the time I gave bond for $6,000 redelivery bond or representative of the surety company, as to the value of this goods, it was stated on the bond—my understanding of the value of the property was that it was $5,000. If the Illinois Surety Company had known that these goods were of a greater value than $5,000, it would not have given the bond. That was, under the circumstances, the utmost limit of a bond of that kind it would give. My understanding of what the figures $3,000 and $6,000 in the upper left-hand corner of this bond are, is that the $3,000 is the duty upon the valuation of the goods, and the $6,000 is double the duty, being the penalty of the bond.

The COURT.—That was estimated on the $5,000?

[51]

Original bond offered in evidence admitted and marked as Defendant's Exhibit "A."

Cross-examination.

At the time that this bond was executed, I had an unlimited power of attorney for the company in the state and the power to execute this bond. I stated that there had been one extension of the bond of six months. The bond first gave six months to export these goods and there was another extension making

(Testimony of Charles T. Hughes.)

it twelve months. If the bond was made November 11, 1911, that one year would extend it up to November 11, 1912. I do not think that within that year I knew of the amount of the invoice that was made by the Government. I do not have any recollection now of having known it. I do not recall whether I did know or not. I made an affidavit in conjunction with a petition for cancellation. (Witness being shown the affidavit.) That is my signature. That is the affidavit that I made. The date is April 29th, 1912.

Mr. JARED.—I will ask you if you made this affidavit: "That this affiant is informed and believes that at the time of the entry of these goods, the stated and appraised value was and is, greatly in excess of the actual value of said goods, but Pierre Grazi and his attorney, after taking the matter into consideration, and owing to the fact that Mr. Grazi was then in good financial circumstances did not fully consider the said item of valuation in making the declaration of the said valuation."

A. Evidently.

Q. Then you knew at that time what the goods had been appraised at?

A. I probably did. I did take a part in having a lot of these goods collected and exported or returned to the Government. I think that it was either within the year of the life of this bond or during the second extension, within the life of the bond.

Q. I will ask you if you did not permit them to take certain [52] goods with them as you stated?

(Testimony of Charles T. Hughes.)

The COURT.—Q. During the life of the bond?

Mr. JARED.—Yes, certain goods. I will read here and see: "That I know, not only by reason of information, but also by my personal knowledge, that these opera singers were undergoing great hardships, and while I retained a few of their goods, I allowed them to get some of them, without which they would have been destitute, and owing to the fact that as they did not speak English they would have been a charge upon the community." That is your statement?

A. Yes. I permitted them to take certain goods with them. Theatrical goods. That affidavit I made was upon application to cancel the bond or upon the application for extension. Undoubtedly it is upon the application to cancel the bond.

Re-examination.

I don't think that when I made that statement there I had any knowledge of the exact amount of the valuation of those goods. I was generally informed that the goods had been either undervalued by Grazi or overvalued by the appraisers. I do not remember who made the representation to me. I do not believe I ever talked to anybody connected with the customs-house, it was not somebody connected with the customs-house. It was somebody else other than the United States officials. As I explained before, the first positive knowledge as to liquidation, as it might be termed, was upon the demand of the collector of customs. The demand that a specific sum be paid. Before that time, I don't know from what source the

(Testimony of Charles T. Hughes.)

representation was made, but I did know that there was a valuation over and above the valuation set forth in the bond. I do not remember the name of the persons whom I allowed to take these goods, it was [53] members of the troupe other than Grazi. I think one of them was Mr. Di Lucca. There were three or four of these members of the troupe who were attempting to take away the property and leave us liable; I think Di Lucca was one of them, and through some means—I forget just what it was—we located some property, and subsequently I exacted, either from him or from the two others, a co-indemnity obligation to render the company free from liability, in the event we had to pay on that part of the obligation. I never had possession of the Grazi goods. Nor of the artists' goods. There were some goods that were shipped to me by Mr. de Journel from Los Angeles at the time the troupe was playing in Los Angeles. That is the way the possession of these goods came to me. Up to that time the artists had possession of these goods.

Q. But you never had any notice of the appraisement of $15,000 until the time you said was somewhere around January, 1915.

A. No. It states in that affidavit there. There is no doubt but what after the execution of the bond, after the appraisement, there was some knowledge on my part that the appraisement was in advance of the amount on which it was entered. That was long after the delivery of these goods to these people. Prior

(Testimony of Charles T. Hughes.)

to the delivery of the goods to these people I never knew of it.

Q. You never knew at any time, did you, that you were to be held for twice the amount of the duty, of the lawful duty, on $5,000 worth of goods.

A. I did not have knowledge in that direction; that was a matter of law that would necessarily be referred to the general counsel for the company.

Q. When did you acquire that knowledge as regards the date of [54] affidavit; a long time before the affidavit was made, or immediately before it was made? I want to fix the date of your acquiring that knowledge.

A. I am not positive of that, Mr. de Journel. I am inclined to believe then. I knew that in one of the applications based upon an affidavit was made by yourself or by somebody else, there was a statement of excessive valuation over the original entered valuation.

By Mr. JARED.—Q. Mr. Hughes, you knew Mr. Grazi, did you not?

A. I met him, yes. It was my understanding that he was the manager of this theatrical troupe.

Testimony of Joseph W. Legget, for Defendant.

JOSEPH W. LEGGET, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I am custom-house broker. I remember in the month of February, 1912, receiving a letter from Mr. Grazi's attorney, requesting me to call upon the

(Testimony of Joseph W. Legget.)

customs-house department and proper officials in San Francisco with some instructions.

In pursuance to the request in the letter I did this: I inquired whether these goods which were covered by a redelivery bond, or a part of them, could at that time be surrendered into the custody of the customs.

Q. What did they say to that?

A. They said they could not.

Q. Did you request that they be seized and confiscated by the Government?

A. I don't recall that I made a formal request that they be seized. I inquired whether they could be seized or taken into custody, and I was told that they could not; that the redelivery bond having been given, that the only thing that could be done by Grazi or his representatives was to hold these goods and to [55] export them. That was about February, 1912.

Cross-examination.

I knew at that time that a six months' bond had been given for these goods. I knew that that six months' was given about November 11th, 1911. I understand as a customs-house broker, that a person giving a six months' bond is entitled to the custody of those goods for six months.

Testimony of Louis I. Imhaus, for Defendant.

LOUIS I. IMHAUS, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I am a playwright and theatrical manager. I was

(Testimony of Louis I. Imhaus.)

the stage manager and interpreter for Mr. Grazi when he was here. I began on my duties in the beginning of November, 1911. On about the 1st of November, 1911, Mr. Grazi was here in San Francisco. He was in San Francisco up to the time when I left him at the time he went to Los Angeles; that was about the 4th of January, I believe, the following year, 1912. He was here continuously from the 1st of November until the last day. He was here also during the summer of 1911. He came here about the month of March and was here all summer. I entered upon my duties at the Valencia Theatre between the 1st and 4th, two weeks before the production. The production was on the 13th. I was there during all that time from 8 o'clock in the morning until 12 o'clock at night. He was there off and on all day long. I remember the theatrical goods and effects coming over to the Valencia Theatre. I think it was about the 10th or 11th of November, somewhere around there, a few days before the opening. I think it was on the 11th. The goods came by the Union Express Company; they were delivered there and the actors came up one after the other. I don't know whether any customs officers came with these goods. I know they were there at the time when [56] we opened the trunks. The trunks were all placed on the stage; that is the first trunks that came with the effects of the actors, and then day by day there came the balance of them, which are naturally the costumes of the chorus. When these goods were landed in the Valencia

(Testimony of Louis I. Imhaus.)

Theatre I placed them on the stage in rotation, at different places, to be opened by the custom-house officials. The actors opened them with their own keys. Each trunk as they were asked, and then they were given permission to take out certain things, which they did. The custom-house officials were there taking count, because I was the interpreter, they all spoke French, and of course I had to get it from them in the French language and translate it for the custom-house officers in English. I think the custom-house officers had the custody of these goods while they were in the Valencia Theatre; they were the only ones I had anything to do with at the time. Well, the people all asked for their wardrobes, that is, their underclothing; they said they had left them in their trunks in Paris, and they were 22 days on the road, and they had not been able to exchange their underclothing, and they were clamoring for them. They said there was some trouble in New York, they could not get them and they wanted them, so I don't know which one it was, but some of the officers, I think Mr. Maguire was there at the time, allowed them to take their underclothing out of their trunks, but the costumes were kept there. They were placed in the trunk. They were placed right on the stage. They were not moved away at the time. Afterwards there was a room built for the purpose of storing any of these goods. That was done I think on Monday. I think the next day; that is when the balance of the costumes came. I think it would be Monday the 13th; each one of the actors

(Testimony of Louis I. Imhaus.)

had a list at the back of their [57] trunk of what they had in the trunk.

Q. Were these goods within the control of the actors during that time, or of anybody else up to the date that they were removed?

A. No one was allowed to touch anything until the contents of the trunk had been given first; they asked me to get what is in it. The customs officers asked me, they asked, "What is this?—it is such and such; now they asked to ask what it is made out of—wool, silk and so on, and I asked that question, then they wanted to know the weight of this and the valuation, what they considered it was worth; as the customs-house officers placed these figures all down, took an account of what was in there then the trunk was given into the possession of the actors, I believe, we worked all day Sunday and all Sunday night and then Monday; in fact we worked right along when the other came, when the chorus came, we had to go through the same formula with every piece of stuff that was there. I mean the following Monday; the 11th, 12th, 13th and 14th, the whole week I was there. The customs officers eventually delivered these goods to the actors and it was placed in their personal rooms; some of them went and got an express wagon to take them to their hotel. That was during the whole week until the performance commenced and and even after the performance, after the 13th—during that week. Now as to the rest of the costumes, a room was built at the back of the stage, back on the alleyway, on the left of the stage, a room was

(Testimony of Louis I. Imhaus.)

built there, a door and a padlock put on it, and as the costumes were entered on the list by the custom-house officers they were carried in by the man who had charge of the costumes, and put on a shelf in different places so that they could get at them whenever the play was produced; they would know where to get the costumes. [58] The customs officials remained in charge there for a very long time; they changed off and went away and came back, but mostly from the beginning, I believe for about three weeks or so, we left them in charge when we left the theatre; I was the last one to leave the theatre. I mean at night, I was the last one to leave the stage myself. And the custom-house officers remained there to take charge of what they had, and they were there during the day. They would say, "What time will you be here to-morrow morning, 8 o'clock or 9 o'clock"; they always made an appointment, what time to be there the next morning. I don't remember whether they stayed there all night; I was not there; I left them there. I left them there every night. That was for probably three weeks, I believe, and after that they were there nearly every day; one or the other came and said: "How are things going on?" and walked on the stage and looked around and would go away and so on; several of them were there during that time, in fact through the whole engagement, until we left for Oakland.

Q. They were in custody there for three weeks?

A. I know they were.

Q. Were they in exclusive custody and control?

(Testimony of Louis I. Imhaus.)

The COURT.—Those are conclusions. He has testified to the facts.

WITNESS.—(Continuing.) I know you could not touch anything unless they passed on it; everything had to be entered before anybody was allowed to touch it. Even after it was entered nothing was allowed to be removed from the premises except what they gave personally to the actors; the balance that was inside of the room there, that was never touched, never put away at all until everything was entered. That room was locked day and night. [59]

Cross-examination.

I said that the custom-house officers had been there at the theatre about three weeks. It took us over two weeks to enter the goods, that is, as there were so many costumes. I think there were 120 people in the troupe. I think that they were busy all the time in taking the appraisement of the goods. They were there. I know I was there all the time from 8 o'clock in the morning putting down each article—each article had to be put down; after we had the 183 trunks, I believe, all those had to be unpacked and then placed on the board and an account taken of them and then put back. From the Valencia Theatre we went to play several engagements to the Cort Theatre and moved some of the costumes. The customs officers were not there with us, they did not go to the Cort, they were at the Valencia Theatre. Each actor brought down his costumes; then as we had a play they simply moved the costumes down there and brought them back. The custom officers

(Testimony of Louis I. Imhaus.)
had not left us, they were still at the Valencia Theatre. We only went to the Cort Theatre for one night. Then we went back again to the Valencia and we did not leave there until we went to Oakland on the 4th of January; we were at the Valencia Theatre up to that time. The customs officials did not go with us to Oakland.

Mr. JARED.—Q. So that the goods were turned over then to the manager of the theatrical show. Is that true?

WITNESS.—(Continuing.) I don't know anything about it. My engagement ended that night in Oakland. I did not go to Los Angeles with them.

Testimony of Gaston Garonne, for Defendant.

GASTON GARONNE, a witness called and sworn on behalf of the defendant. **[60]**

Mr. de JOURNAL.—We would like to have Mr. Imhaus act as interpreter.

The COURT.—What is the purpose of this testimony, to corroborate the last witness?

Mr. WEST.—We want to show that he came from Paris on the ship with these goods; we want to show they were not brought here with Mr. Grazi.

The COURT.—Do you claim that they were?

Mr. JARED.—No, we do not.

The COURT.—You admit Mr. Grazi did not accompany the goods at all?

Mr. JARED.—I have learned since he did not.

Mr. WEST.—Perhaps we will go further. We want to show by him also that he was a member of

(Testimony of Gaston Garonne.)

the operatic company and that he did not receive his portion of these goods until some time in January, 1912; that during all of this time he had to go to the customs officials if he wanted to get any of his effects.

The COURT.—In accordance with the testimony of the last witnesses?

Mr. WEST.—Yes.

Mr. JARED.—I have no objection to that. Let him go.

Mr. WEST.—Probably this will be admitted too, that Mr. Grazi was here in San Francisco during the whole of the month of October, 1911, and did not come with these goods from France.

The COURT.—Counsel has already admitted he did not come. [61]

HERE DEFENDANT RESTS.

Testimony of F. de Journel, for Plaintiff.

F. de JOURNEL, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

At the time that these goods were brought to San Francisco, Mr. Grazi retained me to be his attorney. I do not know that you could call it my being his attorney from July on up; there were no legal matters to attend to; he came visiting at my office a great deal, and the only assistance I tendered to him was to interpret for him when he took the Valencia Theatre. I remember filing a petition, making an application to the Treasury Department to cancel this bond. I do not recall exactly that I stated in

(Testimony of F. de Journel.)
that petition that I was the attorney for Mr. Grazi and also the Illinois Surety Company, but if I did so state it is an error. That petition is dated on the 29th of April, 1912, but this is not correct. I never was the attorney of the Illinois Surety Company; Mr. McNab was, always. I don't know whether or not I was then the attorney for Mr. Grazi. I will explain to you, if you will allow me. He came to me from [62] France with letters of introduction, for me to act as his attorney. I never got a retainer from him at all. I did represent him at the theatre; I did go with him there. I did all I could, looking at the goods and helping them out here, in different ways. I know that these goods were shipped to Mr. Grazi here as manager, that they are consigned to him; we all supposed at the time that he was the owner of these goods; it was only afterwards that we learned he was not. He was the manager of the troupe—he was the proprietor of the troupe, at the time that these goods were shipped into this port. At the time that I filed this petition and also made the affidavit, I did not know anything about what the invoice price of these goods was. I did not know that it was much larger than the *pro forma* invoice was. I wish to explain what I mean by not knowing it; I knew that some part of the goods were appraised at a value ridiculously high, but I did not know that the total of the goods would aggregate $15,888. I did not know that. I do not think that my affidavit will show anything like that. I know that some of the goods were valued by the appraiser

(Testimony of F. de Journel.)

at a much greater value than the people themselves said they were worth, some of the goods, but I was not there during the valuation of these goods; the department had to do that themselves; it would have taken a great deal of time for me to do it. I had no business to do it. I was and am yet the indemnitor on this bond.

Cross-examination.

Mr. Grazi was not the proprietor of the stuff—he was the proprietor of the troupe as impressario—the proprietor of the time of the artists for the time of the engagement—six months. We afterwards learned that he did not own any of the [63] stuff except a box containing some sheet music. What led me to the belief that some of the goods had been estimated ridiculously high by the Government is the information imparted to me by the Costumer in charge "Grimot," that certain cotton slips, used in an opera called "Lakme," and which cost 40 cents, had been appraised some three and two dollars each. I took some steps to have the Government confiscate the stuff. The trouble arose in this manner: some of the actors wanted to take these goods with them, and Mr. Grazi asked me whether they could do so, and I said to him that all these goods were supposed to be in his custody and care, but they still insisted; the chances were, as they had not given any bond that they were going to leave the troupe, and these goods would not be turned to the Government. I wrote a letter to Mr. Maguire asking him what to do about it; that was I think on the 13th of January, 1912,

(Testimony of F. de Journel.)

that was the time the first trouble arose and I thought the Government might do something to take these goods. Mr. Grazi was powerless, he did not own the goods. I never had any answer to that. Because of the failure to act of Mr. Maguire or of anybody else at the custom-house I wrote to Mr. Leggett; the same thing having occurred in Los Angeles. I went to Los Angeles on account of that trouble, the same thing having occurred there and some of these people wanted to go and take their goods with them whereby the Government would lose. I wrote to Mr. Leggett to go to the department and request them to confiscate. Nothing came from that. Mr. Leggett said that the department would not do anything. A year after that, these goods were seized by the Southern Pacific Railroad in Kansas City, and were eventually sold for $590, but prior to that time Mr. West and I went to Mr. Duncan McKinley, then Surveyor of the [64] port, and whom we knew well and explained all matters to him and that these goods were then available to the Government, and requested that they be confiscated. Nothing was done. I learned in June, 1913, through an information given out by Mr. Stratton, collector of customs, that Grazi was dead.

CHARLES T. HUGHES, a witness for the defendant, recalled on behalf of defendant, The Illinois Surety Company, was placed in the hands of a receiver by order of the Superior Court of Cook County, Illinois. James S. Hopkins was appointed receiver on April 19, 1916. After the appointment

of the receiver there was an assumption of the going risks, live risks; this risk was abrogated by the Insurance Commission of Illinois; none of the risks were reinsured.

Mr. WEST.—If your Honor please, at this time I desire to add a paragraph to the amended answer to the effect that on the date specified by Mr. Hughes the order was duly and regularly made by the Superior Court of Cook County, Illinois, in which the Illinois Surety Company was placed in the hands of a receiver.

The COURT.—The only right of a receiver would be to make an application to intervene in this matter if he wanted to. The suit was pending at the time of his appointment and it would not raise a jurisdictional question. I deny the application to amend.

To which ruling of the Court the defendant objected and excepted and designates as error No. 10.

The foregoing constitutes all of the testimony adduced upon the trial of said cause.

Thereupon counsel for the respective parties argued said cause to the Court and submitted the same for decision, and thereafter, to wit, on the 13th day of March, 1917, the Court rendered its [65] decision in favor of the plaintiff and against the defendant for the sum of $6,000.00, which decision was and is in the words and figures following, to wit:

No. 15,878.

(Title of Court and Cause.)

MEMORANDUM ON MERITS.

RUDKIN, District Judge.

> "This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi, conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the Collector of the Port of San Francisco, and enter the same for exportation from the United States within six months from the date of importation."

To which holding of the Court the defendant objected and excepted upon the grounds that the complaint shows in paragraphs V, VIII and X thereof and the defendant was thereby induced to believe that the action was for duties for which duties the importer was liable, but for which the surety-defendant herein was and is not under the terms of its bond liable to plaintiff, which said holding of the Court is designated as error No. 11.

> "It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel, that such properties arrived in the Port and Collection Dis-

trict of New York, in the State of New York on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the Port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of $5,000."

To which finding of the Court the defendant objected and excepted upon the grounds that same is against the evidence in that the testimony shows that the said goods were imported in the United States, to wit, in the port of New York by one Jules Moyreaud, and were shipped thence by him consigned to said Grazi in San Francisco, which said finding of the Court is [66] designated as error No. 12.

"For reasons not entirely clear from the record, two bonds, were executed to the Government at that time, by the importer, Grazi, and the defendant company. The first for $10,000 under Section 2899 of the Revised Statutes, which provides that the Collector may, at the request of the owner, importer, consignee or agent, take bonds with approved security in double the estimated value of the merchandise imported, conditioned that it shall be delivered to the order of the Collector at any time within ten days after the package sent to the public stores has been appraised and reported to the Collector. The second for $6,000, under Paragraph 656 of the Tariff Act of August 5, 1909 (Fed. Statutes, Annotated, Supp. 1909, page 794), which provides as follows:

"'Professional books, implements, instruments and tools of trade, occupation, or employment, in the actual possession at the time of arrival, of persons emigrating to the United States; but this exception shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons or for sale, nor shall it be construed to include theatrical scenery, properties and apparel; but such articles brought by the proprietors or manager of theatrical exhibition arriving from abroad, for temporary use by them in such exhibitions, and not for any other person, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation; Provided, that the Secretary of the Treasury may, in his discretion, extend such period for a further term of six months in case application shall be made therefor.'

"After entry, the goods were appraised according to law and the calculation fixed at $15,558. The duty thereon computed according to law was $9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof, of the appraised value of

> $3,617.34 were delivered to the Collector and exported; but the balance of the goods, subject to a duty of $6,108.66, have never been exported from the United States or delivered over for exportation." **[67]**

To which holding and finding of the Court the defendant objected and excepted, as to the holding that the goods were appraised, and the duty computed according to law upon the grounds (among others) that no notice of the appraisement and liquidation was ever given by the plaintiff to the defendant or to the importer or to any other person or at all, and as to the finding that upon the execution of the latter bond the goods were surrendered to Grazi upon the grounds (among others) that the evidence adduced shows that only a small portion of the goods, if any at all, were surrendered to said Grazi, the balance thereof was delivered to persons other than Grazi, and without his or the defendant's consent, and that as to said deliveries they were made long after the execution of the bond, to wit, on or about the 4th of January, 1912, which said holding and finding is designated as error No. 13.

> "Although there is little controversy over the material facts, numerous defenses were interposed at the trial to which brief reference will be made."
>
> "It is first contended that the existence of the other bond in the sum of $10,000 given under section 2899 of the Revised Statutes, avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was

taken. That bond is only required where goods are delivered to the consignee pending inspection and appraisement. Here, there was no delivery of the goods to the consignee until delivery was made under the bond in suit, so that the former bond never became operative, never served any purpose, and cannot defeat the present action."

To which holding and finding of the Court the defendant objected and excepted upon the grounds (among others) that it appears from the evidence and testimony in the cause that the goods were imported by one Moyreaud in New York, thence consigned by him to said Grazi in San Francisco, that there being no provision of law for the admission free of duty, [68] under a bond for redelivery of theatrical goods merely consigned to, but not brought by the importer, it became necessary to hold them pending appraisement under the $10,000 bond for their production to the collector for examination out of the custom-house, that said $10,000 is shown to have been made use of and return thereof made to the custom department that the $6,000 bond was not made use of until the final appraisement, to wit, January 8th, 1912, if at all, and that on that date the plaintiff knew that the valuation made by Grazi was fraudulent, that the goods ought to have been confiscated, and that the use of the $6,000 obtained by fraud and misrepresentation of Grazi as to the value of the goods would perpetrate to the detriment of the defendant the fraud attempted by said Grazi,

which said holding and finding is designated as error No. 14.

> "Again, it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless, they were so admitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again, it is claimed that the Government should have forfeited the goods for under-valuation. But I apprehend the right of forfeiture was given for the protection of the Government, and not for the protection of the importer or his surety."

To which holding of the Court the defendant objected and excepted upon the grounds among others that the plaintiff knew and the defendant did not know, at the time of the making of the bond, the contents of Exhibit 1 of the plaintiff, to wit, that the said goods were not entitled to entry free of duty under a redelivery bond because they were not brought by the importer, but were shipped and consigned to him by the apparent owners thereof, and that the said recital of the said bond induced the [69] plaintiff to believe that said bond could be safely given under the protection of the law as to the requirements of the statutes governing the parties in the matter of the importation of said goods, and of a bond for their redelivery; and as to the remedy of confiscation to be applied by the plaintiff in accordance with the statute, in case of fraudulent

entry, and in further relying upon that the plaintiff would commit no act of forbearance or nonapplication of the statute such as would tend to make or render the defendant liable for a greater sum than he understood knowingly to secure, to wit the lawful duties on $5,000 worth of goods, which said holding of the Court is designated as error No. 15.

> "It is suggested that the goods were not delivered to Grazi but to members of the troupe. The redelivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe, with his consent and acquiescence was equivalent to a delivery to him."

To which holding and finding of the Court the defendant objected and excepted upon the grounds that it appears from paragraph VII of the first defense in the second amended answer of the defendant that the delivery referred to therein and also referred to in the finding of this Honorable Court now excepted to is the delivery of $5,000 worth of goods and no more, purported to have been entered, valued and appraised before the bond now sued upon was executed, and believed by said defendant to have been so entered, so appraised and so valued, and upon the further grounds that the consideration of the bond now sued upon was the delivery of the goods therein specified to Pierre Grazi and to no other person, and that the delivery that appears by the testimony to have been made, [70] with the consent and acquiescence of Grazi to other persons, but without the consent of the defendant herein to

same, is not equivalent to the delivery to Grazi under the conditions of the bond governing therein, which said holding and finding is designated as error No. 16.

> "It is claimed that the surety was released by an unauthorized extension of the time for exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. The only evidence of such extension is a notation on the face of the bond made some time after its execution, but by whom or when made, is not disclosed. The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter."

To which holding and finding of the Court the defendant objected and excepted upon the grounds that the said defense is raised by the defendant's

third defense of his second amended answer made and served and filed with the leave of the Court first had and obtained, and that it is supported by proof brought before the Court in the testimony, and is also supported by the words, figures and marks appearing in Defendant's Exhibit 1, "Extended 6 months to June 11, 1913," which said exception of the defendant is designated as error No. 17.

That this action was commenced within the limits prescribed by law. [71]

The defendant further excepted to said holding and finding of the Court above recited upon the further grounds that it is against the law and more particularly Section 21 of the Act of June 22d, 1874, therein made and provided, which said holding and finding is designated as error No. 18.

> "Some complaint is made as to the manner in which the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it affected the substantial rights of the parties."

To which holding and finding of the Court the defendant objected and excepted upon the grounds that the evidence shows that the appraisement and liquidation there not being computed until September 4th, 1913, and no notice whatever of same was given neither to the importer nor to the surety the attempted appraisement and liquidation did not constitute such an appraisement and liquidation as would make the defendant liable under his bond in the action herein, and that same and the forbearance of the plaintiff to seize and confiscate the goods

in pursuance to the provisions of law did affect and greatly prejudice the substantial rights of the defendant herein, to wit, to enlarge his liability under the bond from $5,000 worth of goods to $15,588, and on the duty thereupon from $3,000 to 9,726.16 and to deny to him and to set to naught the substantial compliance by said defendant of his conditions of the bond such as the plaintiff represented it to be, to wit, the redelivery of $5,852 worth of goods upon which the duty was computed at $3,617.34, which said holding and finding is designated as error No. 19.

> "As already stated, that bond is not conditioned as required by law as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in United States vs. Dicerhoff, 202 U. S. 302: [72]
>
> "While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se,* it is a valid bond, although not in terms directly required by the statute."

To which holding of the Court the defendant objected and excepted upon the grounds that the use made of the bond of the defendant by the plaintiff without his assent thereto was and is as shown by the *cordence* adduced a substitution of the remedy provided by statute in such case, to wit, the payment or duties by the importer prior to delivery for goods

entered for consumption under section 2899 of the Revised Statutes, and in case same or any goods entered are undervalued to the extent that these goods are shown by the testimony to have been, seizure and confiscation of same; and such use as was made of the said bond in the case at bar is against the law therein made and provided and as tending to render uncertain the liability of a surety under customs bond and is against public policy and *malum in se,* which said holding of the Court is designated as error No. 20.

> "Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. It has breached that condition and the loss to the United States exceeds the penalty of the bond.
>
> "On the whole I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond, and judgment will go in its favor for the amount of such penalty."

To which findings and holdings of the Court the defendant objected and excepted upon the grounds that the evidence produced before the Court in this case shows that if the [73] United States has been damaged, in excess of $6,000 or at all, it is primarily and directly by reason of the dereliction or failure of its agents to apply the laws, rules and regulations therein made and provided, and not by reason of

any fault or breach on the part of the defendant herein, which said finding and holding is designated as error No. 21.

And the defendant further there and then objected and excepted to the said decision of the Court and to the whole thereof, and now does hereby except and specifies the same as error No. 22.

And thereafter, to wit, on the 13th day of March, 1917, and upon said decision the clerk of this Honorable Court, entered judgment in favor of the plaintiff and against the defendant for the sum of Six Thousand Seven Hundred Ninety-eight and no/100 ($6,798.00) Dollars, and costs taxed at $29.10, which judgment was and is in the words and figures following, to wit:

No. 15,878.

(Title of Court and Cause.)

JUDGMENT.

This cause having come on regularly for trial upon the 6th day of February, A. D. 1917, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties, Ed. F. Jared, Assistant United States Attorney, appearing on behalf of the plaintiff and T. C. West and F. de Journel, Esqrs., appearing on behalf of the defendant; and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court,

after due deliberation, having filed its memorandum opinion and ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of $6,000.00, together with interest at seven per cent per annum from April 19, 1915, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that United States of America, plaintiff, do have and recover of and from Illinois Surety Company, a corporation, defendant, the sum of Six Thousand Seven Hundred Ninety-eight and no/100 ($6,798.00) Dollars together with its costs herein expended taxed at ($29.10).

[74]

Judgment entered March 13, 1917.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

To which judgment and the whole thereof defendant then and there objected and excepted, and does hereby except and specifies the same as error No. 23.

The foregoing constitutes all the proceedings had upon said trial.

WHEREFORE, the defendant presents the above and foregoing as a full, true and correct bill of exceptions of all the proceedings had upon said trial

and of its objections and exceptions, and prays that the same may be settled and allowed as such.

T. C. WEST,
F. de JOURNEL,
Attorneys for Defendant.

Dated 27 April, 1917.

Service of the foregoing draft of bill of exceptions proposed by defendant is admitted on this 2d day of April, 1917.

ED. F. JARED,
Attorney for Plaintiff. [75]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 15,878.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ILLINOIS SURETY CO., a Corporation,
Defendant.

Stipulation Re Transmission of Original Exhibits to Appellate Court, etc.

It is hereby stipulated and agreed that the above and foregoing is a full, true and correct bill of exceptions of all the proceedings had upon the trial of the above-entitled action; that the original exhibits referred to in the testimony hereinbefore set forth may, with the leave of the Court upon order first

had and obtained in that behalf, be transferred and delivered to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be produced and used in said court, upon the review of this cause, and that the foregoing bill of exceptions may be signed and settled and be used as such bill of exceptions upon the hearing by the United States Circuit Court of Appeals for the Ninth Circuit, of this cause.

Dated 27th April, 1917.

And it is further stipulated and agreed that the order of approval of said bill of exceptions may be made outside of the jurisdiction of the above-entitled Court.

JNO. W. PRESTON,
U. S. Atty.,
ED F. JARED,
Asst.,
Attorneys for the Plaintiff.

T. C. W.
F. deJ.
E. F. J.

T. C. WEST,
F. de JOURNEL,
Attorneys for the Defendant.

The foregoing bill of exceptions is true and hereby settled and allowed.

FRANK H. RUDKIN,
Judge.

[Endorsed:] Filed May 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[76]**

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named defendant and says: that the decision rendered and the Judgment entered by this Honorable Court on the 13th day of March, 1917, in favor of the plaintiff and against the defendant, are erroneous and unjust, and now files the following assignments of error upon which it will rely in the review of the said decision and judgment of said Honorable Court so rendered and entered in the above-entitled cause as aforesaid.

I.

The Court erred in overruling the amended demurrer of the defendant to the complaint.

II.

The Court erred in overruling the objection of the defendant to the testimony of C. L. Marple, a witness for the plaintiff who testified as follows:

"According to the record, I know that Mr. Grazi got possession of these goods—

"Defendant's counsel interrupting witness objected thereto as being immaterial, irrelevant and in-

competent and assuming something not in evidence, there being no evidence showing that Grazi ever got these goods; which objection was overruled and defendant excepted. [77]

"The COURT.—He is asking if he knows. The witness was going to speak from the record. That is apparently the only information he has.

"WITNESS.—Grazi apparently got the goods at the date of entry. I have no personal knowledge."

III.

The Court erred in overruling the objection of the defendant to the testimony of said C. L. Marple regarding the object and construction by said witness of that certain bond in writing there and then before the Court, which said testimony was as follows:

Mr. JARED (to Witness.)—Are you familiar with the ten-day bond that was given in this case? Just state the object of that bond, if you know.

"To which the defendant objected, which objection was overruled by the Court, which ruling is designated in the bill of exceptions as error No. 4, and thereafter the said witness testified as follows:

"This penal bond was given for the return to the Government's custody of any of the goods or effects in the possession of the importer up to and including ten days from the official return of the appraiser. The official return of the appraiser was made some time in January, 1912; this bond lives for ten days after the date of that return; it then expires. The return dated September 4th, 1913, is the liquidation based on the Appraiser's return of January 8th,

1912. This bond does not last until ten days after the liquidation of the articles, but lasts until ten days after the return of the appraiser, that is noted on the invoice. This is the official invoice. There is the date of the official return, January 8th, 1912. This $10,000 bond was good for ten days after that."

IV.

The Court erred in ruling and holding that the plaintiff had made a case sufficient to put the defendant on his defense by proving that the defendant had admitted that the bond set forth in the complaint [78] had been executed by said defendant, to which said ruling and holding of the Court the defendant excepted and designated as error No. 7, upon the grounds that it was error of the Court to permit the copy of the said bond to be made evidence dispensing the plaintiff with the production of the original there and then in court and in the possession of the plaintiff and for all times prior thereto, since it was made in the possession and custody of the plaintiff, in view of the fact disclosed to the Court by the plaintiff's counsel that the said original bond, if produced, would disclose the fact that it had been materially altered by said plaintiff in that a second extension of six months for the return of the goods by the principal to the plaintiff had been granted to said principal without the assent or knowledge of the defendant, thus compelling the defendant to enter upon his defense in order to have the said original bond entered in the record and admitted in evidence to the end that the Court may see the alteration and second extension endorsed thereupon.

V.

The Court erred in refusing to grant the motion of the defendant for a nonsuit and to render a judgment for the defendant at the close of the plaintiff's evidence.

VI.

The Court erred in refusing to hear the defendant's argument and authorities for a nonsuit at the close of the plaintiff's evidence, unless said defendant there and then bound itself by its counsel to abstain from adducing evidence and put in its defense in the event that the decision of the Court be against said defendant after the hearing by the Court of the said argument and the production of the authorities offered in support thereof.

VII.

The Court erred in denying the application of the defendant to amend its second amended answer by setting forth therein that defendant corporation had gone into the hands of a receiver. [79]

VIII.

The Court erred in finding ruling and holding as follows:

"This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the collector of the port of San Francisco, and enter the same for exportation from the United States within six months from the date of exportation."

Because paragraphs V, VIII, and X of the complaint show same to support an action for duties and not an action for the recovery of any penalty, that if the action be for duties the defendant is not liable therefor under the terms and conditions of the bond sued upon, and if the action be for a penalty, the complaint herein is insufficient to support a judgment thereupon.

IX.

The Court erred in finding, ruling and holding as follows: "It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel. That such properties arrived in the port and collection district of New York, in the State of New York, on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of $5,000."

Because the uncontradicted evidence upon the trial of said cause shows that the said properties were, to the knowledge of the plaintiff, imported in the United States, to wit, in the port of New York, not by Grazi, but by one Jules Moyreaud, and were shipped thence by him, said Moyreaud, consigned to said Grazi in San Francisco, which the defendant did not know. [80]

X.

The Court erred in finding, ruling and holding as follows: "After entry the goods were appraised ac-

cording to law and the calculation fixed at $15,558. The duty thereon computed according to law was $9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof, of the appraised value of $3,617.34 were delivered to the collector and exported; but the balance of the goods, subject to a duty of $6,108.66, have never been exported from the United States or delivered over for exportation."

Because as a matter of law, for the lack of any notice to the importer Grazi or to the surety defendant herein or to any other person on their behalf of the said appraisement and of the said liquidation, no lawful appraisement or lawful liquidation were made and completed and because the evidence upon the trial of said cause shows that only a minor portion of said goods (if any at all) were surrendered to said Grazi, the major part being delivered to persons other than Grazi without the consent of the defendant herein and such deliveries were made long after the execution of the bond, to wit, on or about the 4th day of January, 1912.

XI.

The Court erred in finding, ruling and holding as follows:

"It is first contended that the existence of the other bond in the sum of $10,000 given under section 2899 of the Revised Statutes, avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was taken. That bond is only required where goods are delivered to the consignee

pending inspection and appraisement. Here there was no delivery of the goods to the consignee until delivery was made under the bonds in suit, so that the former bond never became operative, never served any purpose and cannot defeat the present action."

Because it appears clearly from the evidence on the trial of said cause that the plaintiff knew, but the defendant did not know, that said goods having imported by Jules Moyreaud in the port of New York and consigned and shipped by him to said Grazi to San Francisco, said Grazi not being the importer who brought in said [81] goods, they were not entitled to admission free of duty, whereupon plaintiff procured the $10,000 bond under the provisions of section 2899 and held said goods pending appraisement under said bond until about the 8th day of January, 1912, when said appraisement being completed, and the plaintiff having acquired full knowledge that said goods had been undervalued, delivered them, notwithstanding, to various parties, purporting there and then and not theretofore to put the $6,000 into force and effect by the proffering of its consideration, which was the delivery of the said goods to said Grazi and to no other person.

XII.

The Court erred in finding, ruling and holding as follows:

"Again it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless they were so ad-

mitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again it is claimed that the Government should have forfeited the goods for undervaluation. But I apprehend the right of forfeiture was given for the protection of the Government and not for the protection of the importer or his surety."

Because it appears from the evidence on the trial of this cause that at the time of the making of the bond the plaintiff knew and the defendant did not know that the goods were not brought in by the said Grazi but were brought in by one Jules Moyreaud and shipped and consigned to Grazi by Moyreaud, and therefore not entitled to come in free of duty on the security of the bond and on the security of the ownership by Grazi of the said goods, Moyreaud appearing by the recitals of Exhibit "I" to be the owner of said goods and the recitals of the said bond, which were erroneous and which the plaintiff knew, but the defendant did not know, to be erroneous, induced the defendant to enter into and execute said bond, said inducement being that the defendant relied: 1st, upon the implication that he was safe in executing a bond given under the protection of law after all the Statutory requirements governing the admission of goods free of duty under section 656 of the Statute had been fulfilled as to the past transaction [82] and 2d, as to any future transaction that the plaintiff would in compliance with the requirements of the statute confiscate the goods if they had been fraudulently undervalued, and commit no act of forbearance towards the importer Grazi by

abstaining to apply such statute regarding confiscation, as would result in rendering the defendant liable, unbeknown to him, for a greater sum than he agreed knowingly to secure, to wit, the lawful duties on $5,000 worth of goods.

XIII.

The Court erred in finding, ruling and holding as follows:

"It is suggested that the goods were not delivered to Grazi but to members of the troupe. The redelivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe with his consent and acquiescence was equivalent to a delivery to him."

Because it appears from paragraph VII of the first defense in the second amended answer of the defendant that the delivery therein referred to is the delivery of $5,000 worth of goods and no more purported to have been entered, valued, and appraised, before the bond now sued upon was executed, which said $5,000 worth of goods were, and believed by the defendant to have been, lawfully thus entered, valued and appraised, and also because the consideration moving from the defendant to the plaintiff for the bond was to be the delivery to Grazi of such an amount of goods lawfully entered and lawfully valued and not the delivery to various other persons of a treble amount of goods fraudulently entered and fraudulently valued, to the knowledge of the plaintiff and with plaintiff's consent, but without the knowledge or consent of the defendant, and that the acquiescence of Grazi to such an unlawful transac-

tion of the bond now sued upon is not binding upon this defendant under the conditions.

XIV.

The Court erred in finding, ruling and holding as follows:

"It is claimed that the surety was released by an unauthorized extension of the time for the exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. The only evidence of such extension is a notation on the face of the bond made sometime after its execution, but by whom or when made, is not disclosed." [83]

Because it appears in the defendant's third defense of his second amended answer, made, served and filed with the leave of the Court first had and obtained, that said defense is properly raised, and because it also appears from the testimony of record that it is supported by sufficient proof, and it also appears from the testimony that the bond was and has been ever since its execution, and until it was produced and filed in court, in the control and custody of the plaintiff, and that the words appearing thereupon endorsed, "Extended 6 months to June 11, 1913," were presumably so endorsed and written thereupon by the plaintiff, in whose custody said bond always remained, which said fact is duly corroborated by the fact that in pursuance thereto it may be fairly concluded from the testimony that said plaintiff abstained to make any demand from the defendant or from said Grazi for the return and redelivery of the said goods or for the payment of any penalty or duty or to enter any action therefor, and

that said plaintiff further abstained from perfecting any liquidation or computation of said duties or of the value of the said goods, until said second extension had fully expired to wit, until the 4th day of September, 1913.

XV.

The Court erred in finding, ruling and holding as follows:

> "The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter."

Because said finding, ruling and holding is against the statute therein made and provided and applicable to cases like the case at bar, to wit, Section 21 of Chapter 391, the Act of June 22d, 1874, U. S. Stats. at Large, Vol. 18, page 190, and the statute applied by the Court and cited is not applicable thereto.

XVI.

The Court erred in finding, ruling and holding as follows:

"Some complaint is made as to the manner in which the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it affected the substantial rights of the parties."

Because it appearing from the evidence upon the trial of this cause that the appraisement and liquidation were not completed until the 4th of September, 1913, and no notice of the increase over the valuation according to law being given either to the importer or to the surety, such attempted appraisement and liquidation being incomplete and therefore null and void and of no force or effect did not, in law bind or render the defendant liable on its bond and by reason thereof, and because of the forbearance of the plaintiff to seize and confiscate the goods in compliance with the mandatory directions of the statute, the substantial rights of the defendant were materially affected and injured and prejudiced in that his liability under the bond was enlarged from the duty on $5,000 worth of goods to the duty on $15,588 of goods, and for the said duty thereupon from $3,000 to $9,726.16, and that no allowance was made to him for his substantial compliance with the conditions of the bond, that is, the redelivery by him of $5,852 worth of goods upon which the duty was $3,617.34.

XVII.

The Court erred in finding, ruling and holding as follows:

"As already stated, that bond is not conditioned as required by law as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in United States vs. Dickerhoff, 202 U. S. 302: While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute and is neither *malum prohibitum* nor *malum in se,* it is a valid bond although not in terms directly required by the statute."

Because the plaintiff, with knowledge of the manner and circumstances under which the goods were entered and imported, unbeknown of the defendant, as it appears from the evidence, made such use of the bond [85] now sued upon, without the assent of the defendant, as was forbidden by the statute to wit, used the instrument as a bond for the payment of duties on goods entered for consumption under section 2899 and not as a bond for redelivery of goods lawfully entered under section 656 of the tariff act of August 5th, 1909, which was a substitution of remedy unauthorized by the statute and without the assent of the defendant thereto, and because said bond was further used as a substitute remedy without the assent of the defendant in that the plaintiff with knowledge of their fraudulent undervaluation, concealed same from the defendant and in lieu of the seizure and confiscation prescribed by law, after having acquired such knowledge, caused said goods to be

delivered to Grazi or to various other persons relying upon the security of said bond to be made use of, in a manner not provided for and to an extent exceeding the amount of liability agreed for thereunder, thereby tending to render uncertain the liability of a security under customs bond and therefore against public policy and as such *malum in se.*

XVIII.

The Court erred in finding, ruling and holding as follows:

> "Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. It has breached that condition and the loss to the United States exceeds the penalty of the bond. On the while I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond and judgment will go in its favor for the amount of such penalty."

Because the evidence upon the trial of said cause shows that if the plaintiff has been caused to suffer loss and damage, it was due directly and primarily to the dereliction and failure of duty of its agents to apply the laws and regulations therein made and provided and not by reason of any fault or breach on the part of the defendant.

XIX.

The Court erred in finding for the plaintiff and against the defendant and in refusing to find for the

defendant and against the plaintiff in the above-named cause. [86]

XX.

The Court erred in adjudging that the plaintiff shall recover the sum of six thousand seven hundred and ninety-eight dollars and costs taxed at $29.10 from the defendant.

XXI.

The Court erred in adjudging that said plaintiff shall recover from the defendant any sum.

XXII.

The Court erred in finding, ruling and holding that the evidence was sufficient to support or justify the decision and memorandum opinion findings rendered in said cause on the 13th day of March, 1917, and upon which said judgment is based.

XXIII.

The Court erred in not holding as a matter of law that if the plaintiff suffered any damages, it was by reason of its neglect and failure to apply the law therein made and provided.

XXIV.

The Court erred in not rendering and entering a decision, opinion and judgment against the plaintiff and in favor of the defendant to the effect that the plaintiff take nothing in this action.

WHEREFORE the defendant prays that said Judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

F. de JOURNEL,
T. C. WEST,
Attorneys for Defendant.

Copy of assignment of errors received and due service of same acknowledged this 19th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jun. 19, 1917. Walter B. Maling, Clerk. [87]

(Caption and Title.)

Petition for Writ of Error and Bond.

Illinois Surety Company, a Corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered on the 13th day of March, 1917, comes now by T. C. West and F. de Journel, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security for costs which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security said writ of error may be allowed and thereafter determined by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

T. C. WEST,
F. de JOURNEL,
Attorneys for Defendant.

Dated Aug. 27, 1917.

Receipt of a copy of the within petition for Writ of Error on the 27th day of Aug., 1917, is hereby admitted.

JNO. W. PRESTON,
Attorney for the Plaintiff.

[Endorsed]: Filed Aug. 27, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[88]**

(Caption and Title.)

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of T. C. West, Esq., of counsel for defendant, and upon filing a petition for a writ of error and an assignment of errors:

IT IS ORDERED that a writ of error *is* and hereby is allowed to have reviewed in the United Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at Three Hundred ($300) Dollars.

Dated this 27th, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 27, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[89]**

(Caption and Title.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, The Illinois Surety Company (a Corporation), as principal, and National Surety Company of New York, as sureties, are held and firmly bound unto the United States of America, plaintiff above named, in the sum of Three Hundred Dollars, to be paid to said plaintiff, for which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, our heirs, executors, administrators, assigns and successors, firmly by these presents.

Sealed with our seals and dated this 30th day of August, 1917.

WHEREAS, the above-named defendant has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the Northern District of California.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute said writ to effect and answer all costs, if it shall fail to make good its plea, then this obliga-

tion shall be void; otherwise to remain in full force and virtue.

[Notarial Seal Illinois Surety Co.]

THE ILLINOIS SURETY CO.,
By T. C. WEST and
F. de JOURNEL,
Its Attorneys.

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Attorney-in-Fact. **[90]**

State of California,
City and County of San Francisco,—ss.

On this thirtieth day of August, in the year one thousand nine hundred and seventeen, before me, Julius Calmann, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert, acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal, at my office in the City and County of San Francisco, State of Cali-

fornia, the day and year in this certificate first above written.

[Seal] JULIUS CALMANN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 31, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[91]**

(Caption and Title.)

Praecipe for Transcript of Record.

To the Clerk of said Court:

Please prepare transcript of record in the above-entitled suit and incorporate therein the following portions of said record only, to wit:

Complaint.

Amended demurrer to complaint.

Ruling of Court on said demurrer.

Leave of Court to make and file second amended answer.

Second amended answer.

Opinion of Court.

Judgment.

Engrossed bill of exceptions.

Orders settling bill of exceptions and to transfer original exhibits.

Original exhibits (to be produced and transferred but not printed).

Assignment of errors.

Petition for order for writ of error and that amount of bond be set.

Order granting writ of error and fixing amount of bond.

Bond, justification of sureties and approval thereto by Judge.

Writ of error.

Citation with admission of service by United States attorney for plaintiff.

This Praecipe with stipulations therein as to contents and printing. Certificate of clerk of District Court. [92]

And it is hereby agreed and stipulated between counsel for plaintiff and defendant in the above-entitled action that the foregoing comprise all the papers, exhibits and other proceedings necessary or which need be included by the clerk of the above-named court in making up his return to said writ of error as part of such record and that in the printing of the said record for the consideration of the Appellate Court all captions and indorsements should be omitted after the title of the Court and cause has been printed in full on the first page thereof and that in place and stead the words "Caption and Title" and the name of the paper may be substituted together with file-marks if any.

Dated at San Francisco, this 10th day of May, 1917.

ED. F. JARED,
Attorney for Plaintiff.
F. de JOURNAL,
Attorney for Defendant.

[Endorsed]: Filed Aug. 31, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[93]**

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,878.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing ninety-three (93) pages, numbered from 1 to 93, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $41.20; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of September, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [94]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, plaintiff in error, and Illinois Surety Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Illinois Surety Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date thereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the *the* said Circuit Court of Appeals may cause further to be done **[95]** therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 31st day of August, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
District Judge.

Receipt of a copy of the within Writ of Error is hereby admitted this 31 day of August, 1917.

JOHN W. PRESTON,
U. S. Atty.,
Attorney for Defendant in Error **[96]**

[Endorsed]: 15,878. District Court of the United States for the Northern District of California, Second Division. United States of America, Plaintiff, vs. Illinois Surety Company, Defendant. Writ of

Error. Filed Aug. 31, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [97]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Illinois Surety Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 31st day of August, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy of the within Citation is hereby admitted this 31 day of August, 1917.

JOHN W. PRESTON,
U. S. Atty.,
Attorney for Defendant in Error. [98]

[Endorsed]: 15,878. District Court of the United States for the Northern District of California, Second Division. United States of America, Plaintiff, vs. Illinois Surety Company, Defendant. Citation on Writ of Error. Filed Aug. 31, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3072. United States Circuit Court of Appeals for the Ninth Circuit. Illinois Surety Company, a Corporation, Plaintiff in Error,

vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 29, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Enlarging Time to and Including October 20, 1917, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error may have to and including the 29th day of October, 1917, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Sep. 28, 1917.

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 3072. United States Circuit Court of Appeals for the Ninth Circuit. Illinois Surety Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Enlarging Time to File Record on Writ of Error and Docket the Cause. Filed Sep. 28, 1917. F. D. Monckton, Clerk. Refiled Oct. 29, 1917. F. D. Monckton, Clerk.